

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HONORABLE CONSUELO B. MARSHALL, SENIOR JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
PLAINTIFF,)
VS.) NO. CR 06-391-CBM
)
STEVEN ERIK PROWLER,)
)
DEFENDANT.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

FRIDAY, JULY 30, 2010; 11:26 A.M.

RESENTENCING HEARING

MARY RIORDAN RICKEY
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JULY 30, 2010

1 APPEARANCES OF COUNSEL:

2
3 FOR THE PLAINTIFF:

4 U.S. DEPARTMENT OF JUSTICE
5 UNITED STATES ATTORNEY'S OFFICE
6 BY: SHERILYN PEACE GARNETT
7 ASSISTANT UNITED STATES ATTORNEY
8 1200 U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 894-2434

9 FOR THE DEFENDANT:

10 OFFICE OF THE FEDERAL PUBLIC DEFENDER
11 SEAN K. KENNEDY
12 BY: CHRISTOPHER DYBWAD
13 GUY IVERSEN
14 DEPUTY FEDERAL PUBLIC DEFENDERS
321 EAST SECOND STREET
LOS ANGELES, CALIFORNIA 90012
(213) 894-2854

15
16 ALSO PRESENT:

17 RETIRED I.C.E. SPECIAL AGENT GARY KIERNAN
18
19
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1 LOS ANGELES, CALIFORNIA; FRIDAY, JULY 30, 2010

2 11:26 A.M.

3 --OOO--

4 **THE CLERK:** CALLING THE MATTER OF UNITED STATES
5 VERSUS STEVEN ERIK PROWLER, CASE NO. CR-06-391-CBM.

6 APPEARANCES, PLEASE.

7 **MS. PEACE GARNETT:** GOOD MORNING, YOUR HONOR.
8 SHERILYN GARNETT FOR THE UNITED STATES.

9 ALSO PRESENT AT COUNSEL TABLE IS NOW RETIRED
10 SPECIAL AGENT GARY KIERNAN WITH I.C.E.

11 **THE COURT:** GOOD MORNING.

12 **MR. DYBWAD:** GOOD MORNING, YOUR HONOR.
13 CHRIS DYBWAD, DEPUTY FEDERAL PUBLIC DEFENDER, ON BEHALF OF
14 MR. PROWLER, WHO IS PRESENT IN CUSTODY BEFORE THE COURT, AS
15 WELL AS GUY IVERSEN ON BEHALF OF MR. PROWLER AS WELL.

16 **THE COURT:** GOOD MORNING.

17 **THE DEFENDANT:** GOOD MORNING, YOUR HONOR.

18 **THE COURT:** AND WHEN COUNSEL ADDRESS THE COURT, I
19 THINK YOU KNOW YOU'LL GO TO THE LECTERN. WE CAN HEAR YOU
20 BETTER, BUT I'M GOING TO MAKE SOME PRELIMINARY REMARKS
21 BEFORE WE GET THERE.

22 SO AT THIS POINT, YOU MAY BE SEATED.

23 I BELIEVE THIS IS PROBABLY THE THIRD HEARING WHERE
24 THE SENTENCING WAS SET BEFORE THIS COURT, BUT FOR VARIOUS
25 REASONS, WE WERE NOT ABLE TO GET MUCH ACCOMPLISHED THE LAST

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1 TWO OCCASIONS.

2 SO WHAT I WILL DO IS, FOR THE RECORD, I'LL STATE
3 THE PAPERS THAT I'VE REVIEWED. I THINK I MAY HAVE ADDRESSED
4 THAT AT THE LAST HEARING, BUT I'M JUST NOT SURE.

5 SO I JUST WANT TO MAKE SURE THAT YOU ARE AWARE OF
6 ALL THE THINGS THAT I HAVE REVIEWED FOR PURPOSES OF THE
7 SENTENCING. THAT WAY, IF THERE'S SOMETHING THAT I FAILED TO
8 MENTION, YOU CAN BRING IT TO MY ATTENTION. IF I HAVEN'T
9 REVIEWED IT, THEN OBVIOUSLY I WILL REVIEW IT BEFORE WE
10 PROCEED WITH THE ACTUAL SENTENCING.

11 BECAUSE I KNOW THE AREAS OR I THINK I KNOW THE
12 AREAS WHERE THERE WERE OBJECTIONS AS FAR AS THE PARTIES ARE
13 CONCERNED TO THE PRESENTENCE REPORT PREPARED BY PROBATION OR
14 THE POSITIONS TAKEN BY EACH OF YOU, I THOUGHT TENTATIVE
15 FINDINGS WOULD BE HELPFUL.

16 SO I WILL GIVE YOU THE TENTATIVE CALCULATIONS OF
17 THE GUIDELINES AND, TO THE EXTENT THAT IT'S NECESSARY,
18 SOMETHING THAT WOULD SUPPORT MY THINKING IN THAT REGARD; AND
19 THAT WAY, YOU'LL KNOW WHERE TO FOCUS YOUR ARGUMENTS.

20 THE CONDITIONS OF SUPERVISED RELEASE. IT SEEMS TO
21 ME THAT AT LEAST ON ONE OCCASION I LOOKED AT THE PREVIOUS
22 JUDGMENT AND COMMITMENT ORDER PREPARED BY JUDGE TAKASUGI AND
23 SAID THESE ARE THE CONDITIONS THAT HE IMPOSED AND INDICATED
24 TO YOU THAT, IF YOU WERE OBJECTING TO ANY OF THOSE, YOU
25 SHOULD SO ADVISE.

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1 I BELIEVE IT'S CORRECT THAT THE DEFENSE COUNSEL
2 DID OBJECT TO SOME OF THE CONDITIONS, AND THIS IS PROBABLY
3 IN WRITING AS WELL. I THINK DEFENSE COUNSEL ACTUALLY FILED
4 A DOCUMENT OBJECTING TO CONDITIONS OF SUPERVISED RELEASE. I
5 THINK THE GOVERNMENT RESPONDED TO THAT DOCUMENT.

6 AND SO I HAVE FOCUSED ON THE OBJECTIONS AND THE
7 CASES THAT MIGHT HAVE BEEN DECIDED SUBSEQUENT TO THE
8 PREVIOUS SENTENCING TO TRY TO FIGURE OUT HAS THE NINTH
9 CIRCUIT ADDRESSED THE PARTICULAR CONDITIONS.

10 THIS MORNING I THOUGHT AN EASY WAY TO DO THAT WAS
11 JUST TO CALL THE PROBATION OFFICER AND ASK SOME QUESTIONS
12 ABOUT SOME OF THESE CONDITIONS. AND THE OFFICER INDICATED
13 TO ME, WELL, EVEN PROBATION HAS CHANGED THE LANGUAGE OF SOME
14 OF THESE RECOMMENDATIONS, CONDITIONS OF SUPERVISED RELEASE
15 BECAUSE IT HAS BEEN THREE YEARS.

16 SO I ASKED THAT OFFICER IF HE WOULD EITHER E-MAIL
17 OR BRING TO THE COURTROOM THIS MORNING LANGUAGE THAT MAY BE
18 DIFFERENT AS RECOMMENDED BY PROBATION. AND TO THE EXTENT
19 THAT THEY ARE USING NOW DIFFERENT LANGUAGE, I WILL MAKE THE
20 PARTIES AWARE OF THAT; AND SO YOU'LL STILL GET TO ADDRESS
21 WHETHER YOU HAVE OBJECTIONS TO THE LANGUAGE OR WHAT YOUR
22 POSITION MIGHT BE.

23 SO WHY DON'T I, FIRST, JUST START WITH THE THINGS
24 THAT I REVIEWED FOR PURPOSES OF THIS HEARING. THERE'S QUITE
25 A LIST, BUT YOU'LL CERTAINLY RECOGNIZE THE ABSENCE OF

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1 SOMETHING THAT YOU KNOW THAT I SHOULD HAVE REVIEWED.

2 SO THE PROBATION'S PRESENTENCE REPORT IS THE ONE
3 THAT'S DATED MAY 23RD, 2007. THAT'S WHEN IT WAS DISCLOSED.

4 AT SOME POINT, JUDGE TAKASUGI, I THINK AFTER THE
5 MANDATE WAS ISSUED, HE ASKED PROBATION TO PREPARE A
6 SUPPLEMENTAL REPORT. BUT I BELIEVE PROBATION SAID WELL,
7 THERE'S NOTHING NEW, THAT PROBATION'S POSITION WOULD BE THE
8 SAME -- DEFENDANT'S BEEN IN CUSTODY. THERE WAS NOTHING
9 ACTUALLY TO ADD.

10 SO I DON'T THINK A NEW REPORT WAS ACTUALLY
11 PREPARED. SO I AM RELYING UPON THAT ORIGINAL REPORT, WHICH
12 IS DATED MAY 23, 2007.

13 AT THAT TIME PROBATION ALSO PREPARED, OR AROUND
14 THAT TIME, THE CONFIDENTIAL LETTER TO JUDGE TAKASUGI, WHICH
15 INCLUDES THE CONDITIONS OF SUPERVISED RELEASE AND ALSO
16 PROBATION'S POSITION, AND THAT LETTER IS DATED JUNE 25TH OF
17 2007.

18 "PROWLER'S POSITION RE SENTENCING FACTORS," THAT
19 WAS EITHER LODGED OR FILED SEPTEMBER 10, 2007;

20 THE GOVERNMENT'S RESPONSE TO THE DEFENDANT'S
21 POSITION FILED SEPTEMBER 12, 2007;

22 AN ADDENDUM TO THE PRESENTENCE REPORT DATED
23 SEPTEMBER 13, 2007. AND I THINK THIS IS WHERE PROBATION IS
24 RESPONDING TO THE POSITION TAKEN BY THE PARTIES AND
25 ATTEMPTING TO COMMENT ON THE POSITION TAKEN BY THE PARTIES;

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1 THE JUDGMENT AND COMMITMENT ORDER DATED
2 SEPTEMBER 17, 2007. AND I MADE REFERENCE TO THAT BECAUSE
3 THOSE WERE THE CONDITIONS THAT WERE IMPOSED AT THE TIME, AND
4 THAT'S WHERE I STARTED AT LEAST LOOKING AT WHETHER THERE
5 WERE OBJECTIONS TO THOSE CONDITIONS;

6 THE GOVERNMENT'S SUPPLEMENTAL SENTENCING POSITION
7 RE SENTENCING OF THE DEFENDANT FILED OCTOBER 13, 2009;

8 THE DEFENDANT'S OBJECTIONS TO THE CONDITIONS OF
9 SUPERVISED RELEASE FILED NOVEMBER 9, 2009;

10 THE DEFENDANT'S SUPPLEMENTAL INFORMATION RE
11 RESENTENCING FILED NOVEMBER 9, 2009;

12 THE GOVERNMENT'S AMENDED EXHIBITS "A" THROUGH "U"
13 THAT PREVIOUSLY WERE FILED AS ATTACHMENTS TO THE DECLARATION
14 OF THE AGENT, KIERNAN, IN SUPPORT OF THE GOVERNMENT'S
15 POSITION RE SENTENCING OF THE DEFENDANT. AND THAT'S A
16 LODGED DOCUMENT, LODGED ON NOVEMBER 10, 2009;

17 THE DEFENDANT'S SUPPLEMENTAL INFORMATION RE
18 SENTENCING LODGED APRIL 13, 2009 --

19 SOME OF THESE THINGS OBVIOUSLY WERE UNDER SEAL --

20 THE GOVERNMENT'S VICTIM IMPACT STATEMENT RE
21 SENTENCING LODGED ON APRIL 16, 2010. AND SO THAT IS A
22 DOCUMENT THAT I JUST WANT TO -- AND I WILL INQUIRE OF THE
23 GOVERNMENT ABOUT THE VICTIM IMPACT STATEMENT, THE
24 NOTIFICATION GIVEN TO THE VICTIMS AND SO FORTH IN COMPLIANCE
25 WITH THE STATUTE;

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1 THE GOVERNMENT'S RESPONSE TO THE DEFENDANT'S
2 OBJECTIONS TO THE CONDITIONS OF SUPERVISED RELEASE FILED
3 APRIL 16, 2010;

4 AND THE LAST DOCUMENT RECEIVED, THE DEFENDANT'S
5 SUPPLEMENTAL INFORMATION RE SENTENCING FILED JULY 29TH OF
6 THIS YEAR, 2010. SO JUST FILED YESTERDAY.

7 THOSE ARE THE DOCUMENTS.

8 SO I WOULD JUST INQUIRE FROM YOU, IF THERE'S ANY
9 DOCUMENT THAT I FAILED TO MENTION, WOULD YOU PLEASE BRING
10 THAT TO MY ATTENTION.

11 **MR. DYBWAD:** YOUR HONOR, THERE WAS A DOCUMENT
12 ENTITLED "DEFENDANT'S POSITION RE RESENTENCING." I BELIEVE
13 IT'S DOCKET ENTRY 89. IT'S THE DOCUMENT THAT INCLUDES A
14 CHART LAYING OUT THE VARIOUS PARTIES' DISAGREEMENTS AS TO
15 WHICH GUIDELINE ENHANCEMENTS APPLY.

16 I KNOW THAT IN AN EARLIER SENTENCING PROCEEDING,
17 THE COURT IDENTIFIED, I BELIEVE THAT IT HAD, AT THE VERY
18 LEAST, REVIEWED THAT CHART.

19 IT MAY WELL BE THAT THE COURT HAS REVIEWED THAT
20 DOCUMENT AS WELL, BUT I DIDN'T HEAR IT IN THE LIST.

21 **THE COURT:** WHAT'S THE DATE?

22 **MR. DYBWAD:** IF THE COURT WILL GIVE ME A SECOND.

23 IT WAS FILED UNDER SEAL. IT'S THE DOCUMENT THAT
24 INCLUDES THE GOVERNMENT'S PRESS RELEASE AS EXHIBIT "A." I
25 BELIEVE IT WAS LODGED OCTOBER 13, 2009.

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1 **THE COURT:** I DO HAVE A DOCUMENT, "DEFENDANT'S
2 POSITION RE SENTENCING FACTORS." THIS WAS FILED
3 SEPTEMBER 10, 2007. THERE ARE ATTACHMENTS A THROUGH L.

4 SO LET ME JUST LOOK TO SEE. I'M SURE THAT THERE'S
5 ANOTHER MORE RECENT ONE AS WELL.

6 | (PAUSE .)

7 **MR. DYBWAD:** YOUR HONOR, I CAN HAND UP MY COPY IF
8 THE COURT...

9 **THE COURT:** YOU KNOW, IT'S EASIER -- I'M SURE YOU
10 FIND IT TO BE THE CASE -- IF YOU CAN WORK WITH YOUR OWN
11 COPIES BECAUSE YOU'VE WRITTEN AND MARKED AND DONE THINGS
12 THAT YOU THINK ARE HELPFUL. SO LET ME SEE IF I HAVE IT.

13 THERE IS A DOCUMENT, DEFENDANT'S POSITION RE
14 RESENTENCING, AND THIS WAS FILED ON OCTOBER 13, 2009. THE
15 COPY THAT I'M LOOKING AT NOW DOES HAVE ATTACHMENTS. THERE
16 IS AN EXHIBIT "A." THE EXHIBIT "A" COMES FROM THE
17 UNITED STATES ATTORNEY'S OFFICE, PUBLIC AFFAIRS OFFICER.
18 APPARENTLY IT IS A PRESS RELEASE.

19 BUT THAT IS THE ONLY DOCUMENT THAT'S ATTACHED TO
20 THIS. I MEAN, THAT'S THE ONLY EXHIBIT ATTACHED TO THE
21 DOCUMENT THAT I'M REFERENCING.

22 SO DOES THAT APPEAR TO BE THE DOCUMENT THAT YOU
23 ARE TALKING ABOUT?

24 **MR. DYBWAD:** IT IS, YOUR HONOR, AND THAT IS THE
25 ONLY ATTACHMENT TO THAT DOCUMENT.

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1 **THE COURT:** OKAY. AND SO IF YOU TELL ME THE PAGE,
2 I CAN PROBABLY FIND THAT CHART THAT YOU ARE REFERENCING.

3 **MR. DYBWAD:** IF THE COURT WILL GIVE ME ONE SECOND
4 SO I CAN REORGANIZE MY PAPERS AS WELL.

5 PAGE 3 OF THE FILING.

6 **THE COURT:** YES. PAGE 3, THE PARTIES' POSITION RE
7 THE ADVISORY GUIDELINES. AND SO IT DESCRIBES THE VARIOUS
8 GUIDELINES, GIVES A TITLE, INDICATES HOW MANY POINTS,
9 PROBATION'S POSITION, GOVERNMENT'S POSITION, DEFENSE
10 POSITION.

11 **MR. DYBWAD:** THAT IS CORRECT, YOUR HONOR. THAT IS
12 THE ONLY DOCUMENT I HAD REVIEWED BUT DID NOT HEAR IN THE
13 COURT'S INITIAL LIST.

14 **THE COURT:** OKAY. SO I DID REVIEW THAT DOCUMENT.

15 ARE THERE DOCUMENTS THAT THE GOVERNMENT BELIEVES
16 HAVE BEEN FILED, LODGED -- UNDER SEAL, WHATEVER -- THAT I
17 DID NOT MENTION THAT I SHOULD REVIEW FOR PURPOSES OF THE
18 SENTENCING HEARING?

19 **MS. PEACE GARNETT:** I BELIEVE SO, YOUR HONOR.

20 THERE IS A GOVERNMENT'S POSITION RE SENTENCING OF
21 MR. PROWLER.

22 I APOLOGIZE TO THE COURT. BECAUSE I DON'T HAVE A
23 DOCKET SHEET, I CAN'T TELL YOU THE EXACT DATE IT WAS FILED,
24 BUT IT CONTAINS THE HEART OF THE GOVERNMENT'S ARGUMENTS FOR
25 RESENTENCING.

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1 **THE COURT:** AND SO WHAT'S THE TITLE? GOVERNMENT'S
2 SENTENCING POSITION --

3 **MS. PEACE GARNETT:** GOVERNMENT'S POSITION
4 REGARDING SENTENCING OF STEVEN ERIK PROWLER.

5 **THE COURT:** AND IS THERE ANYTHING ON THAT THAT HAS
6 A DATE THAT YOU COULD REFERENCE?

7 **MS. PEACE GARNETT:** NOT ON MY COPY, YOUR HONOR.

8 **THE COURT:** DOES IT HAVE ATTACHMENTS?

9 **MS. PEACE GARNETT:** NO, YOUR HONOR. I BELIEVE I
10 FILED IT IN CONJUNCTION WITH THE DECLARATION OF
11 GARY KIERNAN.

12 **THE COURT:** LET ME SEE. I'M SURE THAT I'VE SEEN
13 IT AND READ IT, BUT LET ME TRY TO SEE IF I CAN FIND IT IN MY
14 STACK OF THINGS HERE.

15 AND ARE YOU ABLE TO DETERMINE WHETHER IT WAS AN
16 '09 DOCUMENT OR AN '07 DOCUMENT?

17 **MS. PEACE GARNETT:** '09, YOUR HONOR. DOCKET 90,
18 AND IT WAS FILED OCTOBER 13, 2009.

19 **THE COURT:** I HAVE IT RIGHT HERE. THE
20 GOVERNMENT'S SUPPLEMENTAL SENTENCING POSITION RE
21 RESENTENCING OF THE DEFENDANT, APPARENTLY FILED OCTOBER 13,
22 '09.

23 SO I DO HAVE THAT, AND I HAVE READ THAT.

24 **MS. PEACE GARNETT:** THANK YOU.

25 **THE COURT:** IT'S HELPFUL BECAUSE I EVEN WROTE THE

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1 WORD "READ." SO I HAVE READ IT. OKAY.

2 ANYTHING ELSE THAT EITHER SIDE THINKS THAT I
3 SHOULD HAVE READ THAT I DIDN'T MENTION?

4 **MS. PEACE GARNETT:** NO, YOUR HONOR.

5 **MR. DYBWAD:** NO, YOUR HONOR.

6 **THE COURT:** OKAY.

7 I DID WANT TO PUT ON THE RECORD I'M HAPPY THAT
8 MR. PROWLER IS HERE TODAY. I KNOW HE HAD, AT ONE POINT,
9 TAKEN THE POSITION THAT HE WOULD RATHER NOT COME PHYSICALLY,
10 THAT HE WOULD RATHER STAY WHERE HE WAS AND BE SENTENCED
11 PURSUANT TO THE VIDEO CONFERENCING.

12 HE PROBABLY RECALLS THAT I EXPRESSED CONCERNS ON
13 MORE THAN ONE OCCASION AS TO WHETHER THAT WAS BEST FOR HIM;
14 AND SO APPARENTLY BETWEEN HE AND HIS COUNSEL, HE DECIDED
15 THAT HE SHOULD BE HERE. SO I'M HAPPY TO SEE HIM HERE TODAY.

16 OKAY. I THINK WHAT I'LL DO NOW IS TO SHARE WITH
17 YOU MY POSITION TO ATTEMPT TO IDENTIFY THE ISSUES THAT I
18 THINK THAT YOU HAVE RAISED THAT AFFECT THE CALCULATION OF
19 THE GUIDELINES.

20 SO OBVIOUSLY PROBATION HAS CALCULATED THE
21 GUIDELINES IN THE PRESENTENCE REPORT; AND BOTH SIDES HAVE A
22 COPY OF THAT, OBVIOUSLY, AS WELL AS THE COURT.

23 YOU HAVE EACH CALCULATED THE GUIDELINES AS YOU
24 THINK APPROPRIATE, AND THEY APPEAR AT LEAST IN THE CHART AND
25 PROBABLY ELSEWHERE THAT DEFENSE COUNSEL REFERRED TO.

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1 AND SO NOW THE COURT, CONSIDERING ALL OF THAT, HAS
2 ALSO CALCULATED THE GUIDELINES AND HAS SOME QUESTIONS,
3 THOUGH. THERE ARE STILL SOME THINGS THAT I WANT TO HAVE YOU
4 ADDRESS. SO I'LL IDENTIFY THOSE FOR YOU.

5 SO PROBATION'S CALCULATION OF THE GUIDELINES, THE
6 BASE OFFENSE LEVEL IS 24, AND I THINK BOTH SIDES AGREE WITH
7 THAT;

8 SPECIFIC OFFENSE CHARACTERISTICS, A PLUS 2. I
9 THINK BOTH SIDES AGREE WITH THAT;

10 ROLE IN THE OFFENSE, NO INCREASE OR DECREASE;

11 THE VICTIM ADJUSTMENT, SIX POINTS;

12 THE OBSTRUCTION OF JUSTICE, ZERO;

13 THE ADJUSTED OFFENSE LEVEL, 32, IS CALCULATED BY
14 PROBATION;

15 AND THEN PROBATION ADDS FIVE FOR THE MULTIPLE
16 COUNT ADJUSTMENT.

17 AND I KNOW THIS IS SOMETHING ON WHICH THE PARTIES
18 ARE NOT IN AGREEMENT. I THINK THE GOVERNMENT AGREES WITH
19 PROBATION, BUT THE DEFENSE DISAGREES.

20 THEN, THE NEXT CATEGORY IS THE CAREER OFFENDER,
21 CRIME LIKELIHOOD, ARMED CAREER CRIMINAL. BUT I THINK THE
22 APPLICABLE ONE IS THE REPEAT SEX OFFENDER, AND THERE'S AN
23 ADDITIONAL FIVE, AND I THINK THERE IS A DISAGREEMENT OVER
24 WHETHER THAT'S APPROPRIATE.

25 ACCEPTANCE OF RESPONSIBILITY, A MINUS THREE.

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1 THE TOTAL OFFENSE LEVEL THEN, 39, WITH A CRIMINAL
2 HISTORY CATEGORY OF 1, GUIDELINE RANGE OF 262 TO 327 MONTHS,
3 AND THEN SUPERVISED RELEASE TWO YEARS TO LIFE, AND THE FINE
4 25,000 TO 250,000.

5 AND THE PROBATION OFFICER RECOMMENDS THAT THE
6 COURT SENTENCE, I BELIEVE, AT THE HIGH END OF THE GUIDELINE
7 RANGE, WHICH IS 327.

8 I BELIEVE THE GOVERNMENT AGREES WITH THAT, BUT THE
9 DEFENDANT CALCULATES OR ASKS THAT THE SENTENCE BE NOT MORE
10 THAN 120 MONTHS.

11 AND THE 120-MONTH SENTENCE, I THINK, IS THE
12 SENTENCE THAT WAS ACTUALLY IMPOSED BY JUDGE TAKASUGI.

13 BUT AS THE PARTIES INDICATED AND AS THE CIRCUIT
14 INDICATES, THE JUDGE DID NOT INDICATE HOW HE CALCULATED THE
15 GUIDELINES TO GET TO THAT SENTENCE, AND SO I THINK EVERYBODY
16 AGREED THE CIRCUIT COUNSELED THAT THE CASE MAY BE RETURNED
17 TO THIS COURT FOR RESENTENCING, AND SO THAT'S WHERE WE ARE.

18 SO IN PROBATION'S CALCULATIONS, THERE IS A
19 FOUR-LEVEL ENHANCEMENT FOR VULNERABLE VICTIMS. AND I THINK
20 THE GOVERNMENT AGREES THAT THAT'S APPROPRIATE, BUT THE
21 DEFENSE BELIEVES IT ISN'T;

22 AND THEN A TWO-LEVEL ENHANCEMENT FOR USING A MINOR
23 TO COMMIT THE OFFENSE; A FIVE-LEVEL ENHANCEMENT BECAUSE THE
24 OFFENSE INVOLVED MORE THAN ONE MINOR; AND A FIVE-LEVEL
25 ENHANCEMENT BECAUSE OF A PATTERN OF SEXUAL MISCONDUCT.

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1 SO THE FACTORS ON WHICH THERE IS AN AGREEMENT --
2 IT'S THE BASE OFFENSE LEVEL, WHICH IS 24; THE COMMERCIAL SEX
3 ACTIVITY SENTENCING FACTOR IN 2G1.3B(4), THE TWO LEVELS, I
4 THINK YOU BOTH AGREE, AND THEN, OF COURSE, THE ACCEPTANCE OF
5 RESPONSIBILITY, THE MINUS THREE, YOU BOTH AGREE.

6 SO AS FAR AS THE VULNERABLE VICTIM SENTENCING
7 FACTOR -- AND SO THESE WOULD BE TENTATIVE -- AND THE USE OF
8 A MINOR TO COMMIT THE CRIME, MY TENTATIVE WOULD BE THAT THE
9 APPLICABLE GUIDELINE FOR USE OF THE MINOR DOES APPLY TO THE
10 SENTENCING. THIS IS 3B1.4. IT WOULD INCREASE BY TWO
11 LEVELS, AND MY TENTATIVE WOULD BE TO INCREASE BY TWO LEVELS
12 FOR THAT FACTOR.

13 THE VULNERABLE VICTIM, THE GUIDELINE SECTION IS
14 3A1.1B(1) AND 3A1.1B(2), AND THE COURT FINDS THAT THAT IS
15 APPLICABLE AND WOULD INCREASE THE FOUR LEVELS.

16 SO I'M GOING TO APPLY THAT.

17 THE NEXT ISSUE, THE MULTIPLE COUNT ADJUSTMENT,
18 WHAT APPLIES, WHAT DOESN'T APPLY. AND THIS IS ONE THAT I AM
19 GOING TO ASK THE PARTIES TO ADDRESS.

20 MY TENTATIVE ON THIS ONE IS TO....

21 FIRST, LET ME INDICATE TO THE PARTIES, INCLUDED IN
22 RELEVANT CONDUCT, THE COURT WOULD INCLUDE THE CHARGED BUT
23 DISMISSED COUNTS AS FAR AS RELEVANT CONDUCT IS CONCERNED.

24 THEN THE COURT LOOKS AT THE VARIOUS VICTIMS.

25 SO I BELIEVE WE HAVE DOES "A" AND "C" THROUGH "F."

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1 AND PROBATION HAS TREATED THOSE AS SEPARATE COUNTS OF
2 CONVICTION AND HAS PLACED THOSE OFFENSES IN SEPARATE GROUPS
3 AND THEN DETERMINED THE OFFENSE LEVEL FOR EACH OF THE
4 SEPARATE GROUPS.

5 THE DEFENDANT'S ARGUMENT IS THE APPLICATION OF THE
6 FIVE LEVELS IS A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO
7 CONFRONTATION.

8 THE GOVERNMENT'S POSITION THAT THE DEFENDANT'S
9 PROHIBITED SEXUAL CONDUCT WITH DOES C, D, E, AND F, AS
10 CHARGED IN THE FIRST SUPERSEDING INDICTMENT, BUT
11 SUBSEQUENTLY DISMISSED FOLLOWING THE DEFENDANT'S GUILTY
12 PLEA, IS ALSO RELEVANT CONDUCT.

13 SO A REVIEW OF SECTION 3D1.2 PERMITS GROUPING OF
14 CLOSELY RELATED COUNTS, AND THERE ARE FOUR SUBPARTS TO THAT,
15 (A) THROUGH (D) (READING:)

16 "(A) WHEN COUNTS INVOLVE THE SAME VICTIM, THE SAME ACT,
17 OR TRANSACTION."

18 AND FOR PURPOSES OF THAT, I THINK THE VICTIM THAT
19 WE'RE TALKING ABOUT IS DOE A.

20 "(B) WHEN COUNTS INVOLVE THE SAME VICTIM AND TWO OR
21 MORE ACTS OR TRANSACTIONS CONNECTED BY A COMMON
22 CRIMINAL OBJECTIVE OR CONSTITUTING PART OF A COMMON
23 SCHEME OR PLAN."

24 AND, AGAIN, I THINK FOR THAT ONE, THE VICTIM THAT
25 WE'RE TALKING ABOUT IS A.

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1 AND SO THE NEXT TWO ARE THE ONES THAT I HAVE MORE
2 DIFFICULTY WITH (READING:)

3 "*(C) WHEN ONE OF THE COUNTS EMBODIES CONDUCT THAT IS*
4 *TREATED AS A SPECIFIC OFFENSE CHARACTERISTIC IN, OR*
5 *OTHER ADJUSTMENT TO, THE GUIDELINE APPLICABLE TO*
6 *ANOTHER OF THE COUNTS.*"

7 I JUST DON'T KNOW IF THAT APPLIES. AND IF IT DOES
8 APPLY, IS THERE EVIDENCE IN THIS RECORD TO SUPPORT IT, AND
9 (READING:)

10 "*(D) WHEN THE OFFENSE LEVEL IS DETERMINED LARGELY ON*
11 *THE BASIS OF THE....*"

12 AND I THINK WHAT'S APPLICABLE, IF APPLICABLE AT ALL
13 HERE --

14 "*....OFFENSE BEHAVIOR THAT'S ONGOING OR CONTINUANCE IN*
15 *NATURE AND THE OFFENSE GUIDELINE IS WRITTEN TO COVER*
16 *SUCH BEHAVIOR.*"

17 AND MY QUESTION AND WHAT I WANT YOU TO ADDRESS IS
18 DOES THAT APPLY? AND IF SO, IS THERE EVIDENCE IN THE RECORD
19 TO SUPPORT IT?

20 IF (C) AND (D) DO NOT APPLY, THEN WE'RE LEFT ONLY
21 WITH DOE A.

22 SO THE COURT WOULD FIND THAT THE CHARGES RELATING
23 TO DOE A, COUNTS 1 THROUGH 3, WHICH WERE CHARGED AND
24 DISMISSED, AND COUNT 4 TO WHICH THE DEFENDANT PLED GUILTY,
25 CAN BE GROUPED PURSUANT TO 3D1.2(B).

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1 NOW, THESE COUNTS ALL INVOLVE DOE A. THEY ARE
2 CONNECTED BY A COMMON SCHEME OR PLAN, AT LEAST IN THE
3 COURT'S POSITION, I WOULD SO FIND.

4 BUT THE GROUPING OF DOE A COUNTS PERMITS THE COURT
5 TO ADD ONE UNIT, BUT SECTION 3D1.4 PROVIDES THAT A ONE-UNIT
6 ENHANCEMENT RESULTS IN NO INCREASE IN THE OFFENSE LEVEL.

7 SO IF I'M LOOKING ONLY AT (A) AND (B) FOR THOSE
8 FOUR CATEGORIES UNDER 3D1.2, THEN THE VICTIM IS DOE A, BUT
9 THERE WOULD BE NO INCREASE UNDER THE GUIDELINES.

10 SO THE QUESTION IS CAN YOU GROUP THE CHARGE IN
11 DISMISSED COUNTS FOR THE OTHER VICTIMS, AND IF SO, WHAT IS
12 THE AUTHORITY OF DOING THAT AND WHAT IS THE EVIDENCE IN THE
13 RECORD THAT WOULD SUPPORT ARGUING THAT.

14 THE NEXT IS THE PATTERN OF ACTIVITY, AND PROBATION
15 HAS ADDED FIVE POINTS FOR THAT.

16 PROBATION BELIEVES IT APPLIES. THE GOVERNMENT
17 BELIEVES IT APPLIES. THE DEFENDANT DOESN'T BELIEVE IT
18 APPLIES IF MULTIPLE COUNT APPLIES. BUT UNDER THE COURT'S
19 FINDINGS, I WOULD NOT BE MAKING THE ADJUSTMENT FOR MULTIPLE
20 COUNTS FOR THE REASON THAT I JUST INDICATED.

21 SO I WOULD ADD THE FIVE ADDITIONAL POINTS UNDER
22 THE PATTERN OF ACTIVITY.

23 SO THAT WOULD BE TENTATIVELY THE COURT'S FINDING.

24 I DON'T THINK IT INVOLVES DOUBLE COUNTING. SO I'M
25 NOT ACTUALLY FINDING THAT I WOULD BE PRECLUDED BECAUSE OF

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1 DOUBLE COUNTING.

2 SO MY CALCULATIONS UNDER THE GUIDELINES WOULD BE
3 THE BASE OFFENSE LEVEL OF 24; THE COMMERCIAL SEX ACT, TWO
4 ADDITIONAL POINTS; THE USE OF THE MINOR, TWO ADDITIONAL
5 POINTS; THE VULNERABLE VICTIM, THE FOUR POINTS; FOR MULTIPLE
6 COUNT ADJUSTMENT, I WOULD NOT MAKE AN ADJUSTMENT; PATTERN
7 ACTIVITY, FIVE POINTS; ACCEPTANCE OF RESPONSIBILITY, A MINUS
8 THREE.

9 THE TOTAL OFFENSE LEVEL IS 34 WITH A CRIMINAL
10 HISTORY CATEGORY OF 1, AND THE GUIDELINE RANGE IS 151 TO 188
11 MONTHS.

12 SO THAT'S HOW I WOULD CALCULATE THE GUIDELINES.

13 WHETHER DEPARTURES UPWARD, DOWNWARD, THE PARTIES
14 WILL ADDRESS THAT; BUT THAT WOULD BE MY CALCULATIONS OF THE
15 GUIDELINES FOR THE REASONS THAT I HAVE INDICATED.

16 SO THOSE WOULD BE THE TENTATIVE FINDINGS I WOULD
17 MAKE, AND SO THE PARTIES MAY ADDRESS THAT.

18 I THINK THIS IS A PROPER TIME, THEN, TO PERMIT YOU
19 TO BE HEARD.

20 THERE ARE OTHER ISSUES WITH CONDITIONS OF
21 SUPERVISED RELEASE THAT WE CAN DISCUSS LATER AFTER WE GO
22 THROUGH THE GUIDELINE CALCULATION.

23 SO WHY DON'T I START WITH THE GOVERNMENT.

24 OBVIOUSLY, THE COURT IS NOT MAKING THE ADJUSTMENT
25 FOR MULTIPLE COUNTS. THE GOVERNMENT THINKS THAT THAT IS

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1 APPROPRIATE.

2 SO THE GOVERNMENT MAY WANT TO ADDRESS THAT AND
3 ATTEMPT TO RESPOND TO THE GUIDELINE THAT I THINK IS
4 APPLICABLE, 3D1.2, AND ADDRESS HOW DOES THE COURT INCLUDE
5 WHAT IS THE EVIDENCE THAT SUPPORTS IT, WHAT'S THE GUIDELINE
6 SUBSECTION THAT PERMITS IT, THE OTHER VICTIMS, VICTIMS DOES
7 I BELIEVE C, D, E, AND F.

8 SO I'LL LET THE GOVERNMENT BE HEARD FIRST.

9 AND IF THERE ARE ANY QUESTIONS BASED UPON THE
10 COURT'S TENTATIVE FINDINGS, JUST ASK THOSE, AND HOPEFULLY I
11 CAN EXPLAIN.

12 (PAUSE.)

13 **MS. PEACE GARNETT:** ONE MOMENT, YOUR HONOR.

14 **THE COURT:** SO IT'S THE MULTIPLE COUNT ADJUSTMENT,
15 AND THE COURT HAS NOT INCREASED FOR MULTIPLE COUNT
16 ADJUSTMENT.

17 THE GUIDELINE THAT I THINK IS APPLICABLE THAT
18 DEALS WITH THE GROUPING IS THE 3D1.2, AND IT HAS THE
19 SUBPARTS A, B, C, AND D.

20 AND TENTATIVELY MY FINDING IS C AND D ARE NOT
21 APPLICABLE OR THERE'S NO EVIDENCE TO SUPPORT C AND D.

22 SO THAT'S THE PLACE WHERE I WOULD ASK THE
23 GOVERNMENT TO START.

24 **MS. PEACE GARNETT:** OKAY, YOUR HONOR.

25 AS TO THE MULTIPLE COUNT ADJUSTMENT, IT'S THE

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1 GOVERNMENT'S POSITION THAT BOTH COUNT 4 AND COUNT 10 INCLUDE
2 THE VICTIMS THAT WERE THE SUBJECTS OF THE DISMISSED COUNTS.

3 THE GOVERNMENT BELIEVES IT'S APPROPRIATE TO GROUP
4 THOSE COUNTS UNDER 3D1.2(B) FORMAT, WHICH PROVIDES WHEN
5 COUNTS INVOLVE THE SAME VICTIM AND TWO OR MORE ACTS OR
6 TRANSACTIONS CONNECTED BY A COMMON CRIMINAL OBJECTIVE OR
7 CONSTITUTING PART OF A COMMON SCHEME OR PLAN.

8 I'LL START WITH COUNT 10, FIRST.

9 COUNT 10 CHARGES TRAVELING TO THAILAND TO ENGAGE
10 IN SEX WITH MINORS OVER THE COURSE OF -- IT ACTUALLY CHARGES
11 DATES, AND LET ME JUST -- I APOLOGIZE, BUT I HAVE TO JUMP
12 AROUND IN MY NOTES A LITTLE BIT.

13 BUT THE DATES THAT ARE CHARGED ARE FROM
14 APPROXIMATELY OCTOBER 24, 2004, TO DECEMBER 19, 2004; AND
15 THAT IS WHAT DEFENDANT PLED GUILTY TO IN COUNT 10.

16 DURING THAT TIME PERIOD, DEFENDANT ENGAGED IN
17 ILLICIT SEXUAL CONDUCT WITH JOHN DOES C THROUGH F, AND WE
18 SHOWED IN OUR PAPERS SPECIFIC JOURNAL ENTRIES WHERE HE
19 REFERENCES ENGAGING IN CONDUCT WITH THOSE MINORS.

20 WE BELIEVE IT'S RELEVANT CONDUCT AS TO COUNT 10.
21 AND I WOULD ALSO WANT TO POINT OUT TO THE COURT THAT 1B1.1,
22 FOR RELEVANT CONDUCT -- OR 1B1.3 ALLOWS CONSIDERATION OF
23 DISMISSED COUNTS AS PART OF RELEVANT CONDUCT.

24 **THE COURT:** I DON'T HAVE AN ISSUE WITH THAT.

25 **MS. PEACE GARNETT:** OKAY. ALL RIGHT.

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1 AND I WOULD ALSO LIKE TO POINT OUT THAT, AS TO THE
2 DEFENDANT'S CONSTITUTIONAL ARGUMENT, THAT THE DEFENDANT
3 NEGOTIATED A PLEA WITH THE GOVERNMENT WHERE IN PARAGRAPH
4 16(B) HE SPECIFICALLY ACKNOWLEDGED THAT THE COURT COULD
5 CONSIDER THE DISMISSED COUNTS IN CALCULATING THE GUIDELINES
6 RANGE.

7 SO UNDER CHAPTER III, PART D, AS TO COUNT 10, IT
8 SHOULD INCLUDE THE MINOR VICTIMS UNDER 3D1.2(B) FORMAT.

9 **THE COURT:** AND SO DO YOU AGREE THAT (C) AND (D)
10 UNDER 3D1.2 DON'T APPLY?

11 **MS. PEACE GARNETT:** I DON'T AGREE, BECAUSE UPON A
12 READING OF 3D1.2(D), IT ALSO CONTEMPLATES BEHAVIOR THAT IS
13 ONGOING OR CONTINUOUS IN NATURE.

14 AND, AGAIN, THE WAY THAT WE CHARGED COUNT 10 WAS
15 THAT HE TRAVELED DURING A SPECIFIED TIME PERIOD, AND DURING
16 THAT TIME PERIOD, HE ENGAGED IN ILLICIT SEXUAL CONDUCT WITH
17 MINORS, AND THAT'S WHAT HE PLED GUILTY TO. HE TRAVELED
18 DURING THE TIME PERIOD, AND DURING THAT TIME PERIOD HE HAD
19 SEX WITH MINORS, PLURAL.

20 **THE COURT:** AND THE TIME PERIOD WE'RE REFERRING TO
21 IS OCTOBER 24, 2004, THROUGH DECEMBER 19, 2004.

22 **MS. PEACE GARNETT:** CORRECT, YOUR HONOR.

23 AND, IN FACT, WE SPECIFICALLY ASKED JOHN DOES C,
24 D, E, F -- WE POINTED OUT IN THE DECLARATION OF GARY KIERNAN
25 THAT HE, THE DEFENDANT, COLLECTED INDEX CARDS WHERE HE

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1 DETAILED ON A SPECIFIC DATE --

2 DOES THE COURT HAVE THE AMENDED DECLARATION OF
3 GARY KIERNAN?

4 **THE COURT:** OH, YES.

5 **MS. PEACE GARNETT:** IF I COULD JUST WALK THE COURT
6 THROUGH IT JUST A LITTLE BIT, I'LL SHOW YOU WHAT I'M TALKING
7 ABOUT.

8 **THE COURT:** OKAY. LET ME JUST GET IT.

9 SO I HAVE THE DECLARATION WITH THE EXHIBITS
10 ATTACHED THAT WAS FILED 9/7/07, AND THEN I HAVE THE AMENDED
11 EXHIBITS A THROUGH U THAT WERE PREVIOUSLY FILED AS
12 ATTACHMENTS, AND THIS WAS FILED NOVEMBER 20TH OF 2009.

13 SO WHICH OF THE TWO DOCUMENTS ARE YOU REFERENCING?

14 **MS. PEACE GARNETT:** THE AMENDED EXHIBITS BECAUSE
15 THE AMENDED EXHIBITS CONTAIN BATES STAMPS. SO I CAN DIRECT
16 YOU TO A PARTICULAR EXHIBIT AS WELL AS A PAGE NUMBER WHERE I
17 CAN POINT THINGS OUT.

18 **THE COURT:** OKAY.

19 **MS. PEACE GARNETT:** SO IF I COULD DRAW THE COURT'S
20 ATTENTION TO EXHIBIT "O," PAGE 107.

21 **THE COURT:** THE ONLY THING THAT MAKES IT A LITTLE
22 BIT MORE DIFFICULT TO FIND IS THAT IT DOESN'T HAVE THE TABS.

23 **MS. PEACE GARNETT:** OH, I APOLOGIZE. MINE DOES.
24 I'M SORRY ABOUT THAT.

25 **THE COURT:** OKAY. LET'S SEE.

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1 IT'S EXHIBIT" O"?

2 **MS. PEACE GARNETT:** YES, PAGE 107.

3 **THE COURT:** 107.

4 AND ARE THE PAGE NUMBERS AT THE BOTTOM OR THE TOP?

5 **MS. PEACE GARNETT:** THE VERY BOTTOM.

6 **THE COURT:** I HAVE 107.

7 **MS. PEACE GARNETT:** I HIGHLIGHTED PORTIONS OF 107
8 ON ALL OF THE COPIES.

9 **THE COURT:** RIGHT. I SEE IT. WHAT'S HIGHLIGHTED
10 MAKES A REFERENCE TO A YOUNGSTER, THE AGE.

11 **MS. PEACE GARNETT:** BOY, JOY, AND KAY, WHICH ARE
12 JOHN DOES E, D, AND C, RESPECTIVELY.

13 THIS IS A LEDGER THAT WAS KEPT BY THE DEFENDANT.
14 THIS IS WHAT IT LOOKS LIKE IN REAL LIFE, YOUR HONOR. I'M
15 HOLDING IT UP. WHAT YOU HAVE IS A COPY (INDICATING.)

16 BUT THIS HE KEPT, BY YEAR, HIS SEXUAL EXPLOITATION
17 OF THE BOYS, HOW MUCH HE PAID THE BOYS FOR THINGS SUCH AS
18 TIPS AND TAXI AND THAT SORT OF THING. HE KEPT INDEX CARDS
19 WHERE HE DID EXACTLY THE SAME THING.

20 SO UNDER NOVEMBER, 2004, YOU SEE THIS NOTATION,
21 "BOY, JOY, AND KAY, 14 YEARS OLD." THAT'S HOW OLD KAY WAS.
22 "11/7," THAT REFERS TO NOVEMBER 7TH, 2004, WHICH IS IN THE
23 TIME PERIOD THAT WE CHARGED IN COUNT 10.

24 AND THEN IT SAYS HE PAID 600, WHICH IS 200 BAHT,
25 WHICH IS ABOUT \$5, FOR EACH BOY THAT HE HAD SEX WITH, PLUS

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1 60 IN TIPS, PLUS 100 IN TAXI, ET CETERA. OKAY.

2 I'LL DIRECT THE COURT'S ATTENTION TO DECEMBER,
3 2004, WHERE IT REFERS TO BOY 3 OR "EM III" ON 12/19/2004,
4 WHICH THAT'S THE END OF THE TIME PERIOD THAT WE CHARGED IN
5 COUNT 10. AND IN THAT INSTANCE, HE PAID THE TWO BOYS 200
6 BAHT EACH AND 170 FOR TAXIS.

7 NOW, THIS INFORMATION IS CONTAINED IN THE LEDGER.

8 IF I COULD DIRECT THE COURT'S ATTENTION TO EXHIBIT
9 "F," WHICH IS ON PAGE 33.

10 (PAUSE.)

11 **MS. PEACE GARNETT:** I'VE ALSO HIGHLIGHTED THE
12 JOURNAL ENTRY THAT HE KEPT.

13 **THE COURT:** SO THIS IS IN HIS HANDWRITING.

14 **MS. PEACE GARNETT:** YES.

15 I'LL SHOW YOU WHAT THE JOURNAL ENTRIES LOOK LIKE
16 IN REAL LIFE, SINGLE SPACED, DOUBLE PAGES, WHERE HE KEPT
17 APPROXIMATELY 50 JOURNALS DETAILING HIS SEXUAL EXPLOITS WITH
18 THESE MINORS.

19 AND WHAT EXHIBIT "F" ON PAGE 33 REFERS TO IS THE
20 ACTUAL SEX ACTS HE COMMITTED WITH BOY, JOY, AND KAY.

21 **THE COURT:** SAME BOYS THAT WERE REFERENCED AT PAGE
22 107?

23 **MS. PEACE GARNETT:** YES.

24 JUST TO GIVE YOU AN EXCERPT, IN THE JOURNAL
25 ENTRY -- IT STARTS ON THE 6TH, BUT IT GOES OVER UNTIL

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1 NOVEMBER 7TH, '04. HE SAYS (AS READ:)

2 "I GOT OFF IN THE REGULAR SPOT TOWARDS THE CORNER.

3 AGAIN, THE BOYS SEEMED TO BE CONGREGATING CLOSER TO THE
4 CORNER AND WERE IN THE STREET WORKING."

5 HE TALKS ABOUT HAVING JOY, BOY, AND KAY, BRINGING
6 THEM BACK TO HIS HOUSE AND ENGAGING IN SEX ACTS WITH THEM.

7 AND HE ALSO TALKS ABOUT -- I MAY HAVE GOTTEN THIS
8 WRONG. THIS MIGHT BE EM III THAT I'M REFERRING TO, BUT WHAT
9 I'M TRYING TO SHOW THE COURT IS THE DEFENDANT IN HIS
10 JOURNALS TALKS ABOUT WHAT HE DID. HE KEEPS A RECORD OF WHAT
11 HE DID.

12 IN HIS JOURNALS, HE GIVES YOU THE DETAILS OF WHAT
13 HE DID, AND THEN THERE ARE ALSO CORRESPONDING PHOTOGRAPHS.
14 HE TALKED ABOUT TAKING PHOTOGRAPHS OF JOY, BOY, AND KAY
15 INDIVIDUALLY AND COLLECTIVELY AS A GROUP.

16 AND IF I COULD TURN THE COURT'S ATTENTION TO
17 EXHIBIT "T," AT PAGE 154.

18 **THE COURT:** PAGE NUMBER AGAIN?

19 **MS. PEACE GARNETT:** 154.

20 **THE COURT:** 154. I HAVE THAT.

21 **MS. PEACE GARNETT:** EXHIBIT "T" DEPICTS ONE OF THE
22 PHOTOGRAPHS THAT HE TOOK OF JOY, BOY, AND KAY. THIS
23 PHOTOGRAPH WAS SHOWN TO EACH ONE OF THESE VICTIMS, AND THEY
24 IDENTIFIED THEMSELVES UNDERNEATH THEIR PARTICULAR PHOTO.

25 SO THIS PHOTO CORROBORATES HIS JOURNAL ENTRY, IT

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1 CORROBORATES THE INDEX CARDS, AND IT ALSO CORROBORATES HIS
2 LEDGER THAT HE KEPT ABOUT THE TRANSACTIONS THAT HE HAD IN
3 2004.

4 AND, AGAIN, THIS ENTIRE TRANSACTION OR ACT OF
5 SEXUAL EXPLOITATION OCCURRED WITHIN COUNT 10, WITHIN THE
6 TIME FRAME OF COUNT 10.

7 THE SAME IS TRUE FOR JOHN DOE F, WHO ALSO GOES BY
8 THE NAME OF EM III. YOU HAVE JOURNAL ENTRIES, YOU HAVE A
9 LEDGER, AND YOU HAVE SPECIFIC DETAILS OF WHAT HE DID WITHIN
10 THE TIME FRAME OF COUNT 10.

11 SO AS TO COUNT 10, IT'S THE GOVERNMENT'S POSITION
12 THAT IT IS RELEVANT CONDUCT AND THAT THE FOUR BOYS WHO
13 DEFENDANT EXPLOITED DURING THE TIME FRAME OF COUNT 10 SHOULD
14 BE CONSIDERED EACH AS IF THEY WERE CHARGED IN THE SEPARATE
15 COUNT. AND, IN FACT, THEY WERE CHARGED IN SEPARATE COUNTS,
16 THE DISMISSED COUNTS THAT DEFENDANT AGREED PURSUANT TO THE
17 PLEA AGREEMENT THAT COULD BE TAKEN INTO ACCOUNT BY THIS
18 COURT.

19 AS TO COUNT 4, COUNT 4 INVOLVED JOHN DOE A. AND
20 JOHN DOE A WAS USED BY MR. PROWLER TO BRING OVER JOHN DOE B
21 ON MAY 10, 2005; ON THE EVENING BEFORE MAY 10TH --

22 **THE COURT:** AND THE FACT THAT THE COURT HAS
23 ALREADY INDICATED TENTATIVELY THE USE OF THE MINOR, I WOULD
24 INCREASE FOR THAT. SO I THINK THE CONDUCT THAT YOU'RE GOING
25 TO DESCRIBE IS THAT CONDUCT BACK AND FORTH.

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1 **MS. PEACE GARNETT:** YES, IS THAT CONDUCT.

2 **THE COURT:** ALL RIGHT.

3 **MS. PEACE GARNETT:** WHAT HAPPENED ON MAY 10 WAS
4 THAT JOHN DOE A CONTACTED MR. PROWLER AND SAID, YOU KNOW, I
5 HAVE THIS BOY, AND HE'S GOING TO BRING HIM OVER. AND IN
6 DEFENDANT'S OWN ADMISSIONS, WHICH ARE REFERENCED IN THE
7 P.S.R., DEFENDANT KNEW THAT THIS MEANT THAT HE WAS GOING TO
8 HAVE SEX WITH THE BOY.

9 THERE IS A HISTORY BETWEEN DEFENDANT AND JOHN
10 DOE A, WHO IS KNOWN AS "JACK," WHERE DEFENDANT COERCED JACK
11 TO BRING YOUNGER BOYS FOR HIM TO HAVE SEX WITH. THE COURT
12 HAS ALREADY FOUND USE, BUT THERE ARE VARIOUS JOURNAL ENTRIES
13 OVER TIME WHERE HE WAS ASKING JOHN DOE A TO BRING BOYS.

14 AND JOHN DOE A BROUGHT ANOTHER BOY PRIOR TO THIS
15 INCIDENT BY THE NAME OF -- I BELIEVE IT WAS DTON THAT
16 DEFENDANT HAD SEX WITH A COUPLE OF TIMES.

17 AND ON MAY 10, 2005, WHICH IS CHARGED IN COUNT 4,
18 JOHN DOE A BROUGHT JOHN DOE B. COUNT 4 INVOLVES JOHN DOE A
19 AND JOHN DOE B.

20 JOHN DOE B WAS THE SUBJECT OF A GUILTY PLEA BY
21 DEFENDANT IN THAILAND. HE WAS SENTENCED TO TWO YEARS. HE
22 SERVED ONE YEAR FOR THAT OFFENSE. THERE'S NO DISPUTE THAT
23 HE ACTUALLY COMMITTED THAT CONDUCT BECAUSE HE PLED GUILTY TO
24 IT.

25 SO IT'S THE GOVERNMENT'S POSITION IT'S RELEVANT

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1 CONDUCT AS TO COUNT 4 BECAUSE THIS WAS A CONTINUOUS
2 TRANSACTION; IT OCCURRED WITH BOTH BOYS. DEFENDANT ADMITTED
3 ON THE DAY OF HIS ARREST THAT HE HAD HAD SEX WITH BOTH BOYS.

4 BOTH BOYS WERE INTERVIEWED BY THE ROYAL THAI
5 POLICE AND ADMITTED HAVING SEX WITH DEFENDANT AND IDENTIFIED
6 DEFENDANT. DEFENDANT IDENTIFIED THEM. SO THERE'S NO
7 DISPUTE THAT COUNT 4 INVOLVED TWO MINORS.

8 **THE COURT:** SO LET ME JUST ASK A COUPLE OF
9 QUESTIONS.

10 SO IF WE LOOK AGAIN AT 3D1.2 AND WE LOOK AT THOSE
11 VARIOUS SUBPARTS. SO A, WHICH IS ONE THAT YOU THINK IS
12 APPLICABLE FOR PURPOSES OF THIS DISCUSSION, MULTIPLE COUNTS.
13 AM I CORRECT?

14 **MS. PEACE GARNETT:** YES.

15 **THE COURT:** AND SO WHO IS THE VICTIM THAT WE'RE
16 REFERRING TO IN A?

17 **MS. PEACE GARNETT:** JOHN DOE A.

18 **THE COURT:** AND THEN B, I THINK YOU BELIEVE IS
19 APPLICABLE.

20 **MS. PEACE GARNETT:** YES.

21 **THE COURT:** AND SO WHO IS THE VICTIM THAT WE'RE
22 REFERRING TO IN B?

23 **MS. PEACE GARNETT:** JOHN DOE A AS WELL.

24 **THE COURT:** THEN YOU BELIEVE THAT D IS APPLICABLE
25 BECAUSE THE BEHAVIOR IS ONGOING OR CONTINUOUS IN NATURE AND

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1 THE OFFENSE GUIDELINE IS WRITTEN TO COVER SUCH BEHAVIOR --

2 MS. PEACE GARNETT: CORRECT.

3 THE COURT: -- AND YOU'VE ARTICULATED THE EVIDENCE
4 TO SUPPORT THAT.

5 AND SO THE QUESTION IS WHO ARE THE VICTIMS IN B,
6 IF WE'RE LOOKING AT VICTIMS AS OPPOSED TO JUST CONDUCT?

7 MS. PEACE GARNETT: I WOULD SAY ALL OF THE MINORS,
8 JOHN DOES A THROUGH F, ARE THE VICTIMS IN B.

9 THE COURT: OKAY. ANYTHING ELSE THAT YOU WISH TO
10 PLACE ON THE RECORD TO SUPPORT YOUR POSITION AS TO WHY THE
11 COURT SHOULD INCLUDE THE FIVE ADDITIONAL POINTS, AS
12 PROBATION HAS, FOR THE MULTIPLE COUNTS?

13 MS. PEACE GARNETT: ONE MOMENT, YOUR HONOR.

14 NO, YOUR HONOR.

15 THE COURT: NOW, LET ME HEAR FROM THE DEFENSE.

16 I BELIEVE YOUR POSITION ON THIS IS THE COURT
17 SHOULD NOT ADD THE ADDITIONAL FIVE POINTS FOR MULTIPLE
18 COUNTS, AND I BELIEVE THAT YOU'RE PROBABLY LOOKING AT THE
19 SAME GUIDELINE SECTION AND THE SAME SUBPARTS.

20 SO LET ME HEAR YOU AS TO WHY YOU THINK THAT IS NOT
21 APPLICABLE.

22 MR. DYBWAD: THAT IS CORRECT, YOUR HONOR, THAT WE
23 DO NOT BELIEVE IT IS APPLICABLE.

24 BASED ON THE COURT'S COMMENTS TODAY, I THINK
25 FOCUSING ON SUBPART C OF 3D1.2, ONE OF --

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1 **THE COURT:** I WASN'T LOOKING AT C. I SAID C
2 DOESN'T SEEM TO BE APPLICABLE. I THINK GOVERNMENT DIDN'T
3 FOCUS ON C. THE GOVERNMENT THINKS THAT THE APPLICABLE
4 SUBPARTS ARE A, B, AND D.

5 **MR. DYBWAD:** IN SHORT, YOUR HONOR, ONE OF THE
6 GROUPS TAKES INTO ACCOUNT AN ENHANCEMENT BASED ON THE
7 PATTERN OF ACTIVITY INVOLVING ALL OF THE MINORS. IN OTHER
8 WORDS, JOHN DOE A'S GROUP, WHICH I BELIEVE IS -- BY
9 PROBATION, THE LARGEST GROUP, BOTH ENCAPSULATES ACTIVITY
10 REGARDING JOHN DOE B.

11 **THE COURT:** OKAY. SO WHICH IS THAT, THAT YOU ARE
12 REFERRING TO THAT YOU THINK ARE --

13 I THINK WHAT YOU'RE SAYING IS THAT ONE OF THE
14 CALCULATIONS HAS ALREADY INCLUDED THIS ACTIVITY?

15 **MR. DYBWAD:** THAT'S WHAT I'M SAYING, YOUR HONOR.

16 **THE COURT:** AND SO WHICH ONE, IF YOU LOOK AT
17 PROBATION'S CALCULATIONS, DO YOU BELIEVE ALREADY INCLUDES
18 THIS ACTIVITY?

19 **MR. DYBWAD:** THE USE OF A MINOR ENHANCEMENT
20 INCLUDES THE ACTIVITY, AND THE PATTERN AND PRACTICE
21 FIVE-LEVEL ENHANCEMENT INCLUDES THIS ACTIVITY.

22 **THE COURT:** AND SO IT'S YOUR POSITION THAT, IF THE
23 COURT THEN INCLUDES IT AGAIN UNDER D OF 3D1.2, THAT'S DOUBLE
24 COUNTING.

25 **MR. DYBWAD:** THAT'S CORRECT.

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1 **THE COURT:** IS THAT THE ARGUMENT?

2 **MR. DYBWAD:** THAT'S CORRECT, YOUR HONOR.

3 **THE COURT:** OKAY. ANYTHING ELSE?

4 **MR. DYBWAD:** YOUR HONOR, IF I COULD BRIEFLY BE
5 HEARD ON THE VULNERABLE VICTIM ENHANCEMENT, GIVEN THE
6 COURT'S TENTATIVE?

7 **THE COURT:** DON'T TAKE ME THERE YET. LET ME TRY
8 TO RESOLVE THIS IN MY OWN MIND. CERTAINLY THAT'S WHY I
9 ARTICULATED THE TENTATIVES BECAUSE I WANTED TO GIVE BOTH
10 SIDES AN OPPORTUNITY TO BE HEARD BASED ON THE TENTATIVE, AND
11 THEN LATER I WILL GO THROUGH THE ACTUAL SENTENCE THAT I'M
12 GOING TO IMPOSE.

13 **MR. DYBWAD:** UNDERSTOOD, YOUR HONOR.

14 AT THIS POINT, I'LL SIT DOWN.

15 **THE COURT:** ALL RIGHT.

16 SO THE GOVERNMENT MIGHT WANT TO ADDRESS, THEN IT
17 SOUNDS LIKE WHAT DEFENDANT'S ARGUMENT IS, IS TO ENHANCE FOR
18 D OR PURSUANT TO D, ONGOING CONDUCT, THAT THAT'S ALREADY
19 BEEN CALCULATED IN AND THEREFORE WOULD CONSTITUTE DOUBLE
20 COUNTING.

21 SO I'LL LET YOU ADDRESS THAT.

22 **MS. PEACE GARNETT:** THE DOUBLE COUNTING ISSUE?

23 **THE COURT:** WELL, I THINK THAT'S ALL DEFENSE IS
24 SAYING. HE'S SAYING DON'T ENHANCE FOR MULTIPLE -- DON'T
25 MAKE A MULTIPLE COUNT ADJUSTMENT BECAUSE THE COURT HAS

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1 ALREADY OR AT LEAST PROBATION, IN ITS CALCULATION, HAS
2 ALREADY MADE THE ADJUSTMENT FOR THE VERY SAME ACTIVITY THAT
3 YOU ARE IDENTIFYING THAT WOULD SUPPORT THE MULTIPLE COUNT
4 ADJUSTMENT.

5 I THINK THAT'S WHAT DEFENDANT IS SAYING, AND SO
6 ULTIMATELY WHAT THAT COMES DOWN TO IS DOUBLE COUNTING.

7 SO I'M JUST GIVING YOU AN OPPORTUNITY TO ADDRESS
8 WHY DOES THAT ARGUMENT NOT APPLY; WHY IS IT NOT DOUBLE
9 COUNTING; OR IF IT IS DOUBLE COUNTING, IS IT APPROPRIATE.

10 **MS. PEACE GARNETT:** WHY IS IT NOT DOUBLE COUNTING
11 TO TAKE INTO ACCOUNT JOHN DOES A THROUGH F UNDER THE
12 MULTIPLE COUNT ADJUSTMENT?

13 **THE COURT:** I BELIEVE THAT'S THE ARGUMENT THE
14 DEFENSE IS MAKING, THAT THE REASON THAT THE COURT --

15 AND DEFENSE CERTAINLY IS CAPABLE OF MAKING HIS OWN
16 ARGUMENT. SO IF I'M GETTING IT WRONG, YOU TELL ME.

17 BUT I BELIEVE WHAT DEFENSE IS SAYING, THE REASON
18 THE COURT DOES NOT MAKE AN ADJUSTMENT UNDER THE MULTIPLE
19 COUNT ADJUSTMENT, IN LOOKING AT THE CONDUCT THAT THE
20 GOVERNMENT RELIES UPON, WHICH IS THE ONGOING CONDUCT
21 INVOLVING ALL OF THE BOYS THAT YOU IDENTIFIED -- THAT THAT'S
22 ALREADY BEEN TAKEN INTO CONSIDERATION IN ENHANCING UNDER THE
23 USE OF A MINOR, AS WELL AS THE PATTERN OF ACTIVITY.

24 **MS. PEACE GARNETT:** OKAY. I WILL ADDRESS THAT
25 ISSUE. I UNDERSTOOD THE DOUBLE COUNTING IN THE PAPERS TO BE

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1 SOMETHING A LITTLE BIT DIFFERENT.

2 **THE COURT:** MAYBE.

3 BUT HAS THE COURT PROPERLY CHARACTERIZED THE
4 DEFENSE'S POSITION?

5 **MR. DYBWAD:** YES, YOUR HONOR.

6 **THE COURT:** OKAY.

7 **MS. PEACE GARNETT:** SO MY RESPONSE WOULD BE THIS,
8 YOUR HONOR.

9 IT ISN'T DOUBLE COUNTING UNDER THE GUIDELINES
10 ITSELF, BECAUSE GUIDELINES SECTION 2G1.3(D) PROVIDES FOR A
11 SPECIAL INSTRUCTION WHICH SAYS (AS READ:)

12 *"IF THE OFFENSE INVOLVED MORE THAN ONE MINOR" --*

13 AND NOW WE'RE TALKING ABOUT COUNT 4 AND COUNT 10
14 THEN --

15 *"CHAPTER THREE, PART D," I.E., "MULTIPLE COUNTS, SHALL*
16 *BE APPLIED AS IF THE PERSUASION, ENTICEMENT, COERCION,*
17 *TRAVEL" --*

18 WHICH IS WHAT WE'RE TALKING ABOUT NOW --

19 *"OR TRANSPORTATION TO ENGAGE IN A COMMERCIAL SEX ACT OR*
20 *PROHIBITED SEXUAL CONDUCT OF EACH VICTIM HAD BEEN*
21 *CONTAINED IN A SEPARATE COUNT OF CONVICTION."*

22 (END OF QUOTED MATERIAL.)

23 **MS. PEACE GARNETT:** SO MY RESPONSE WOULD BE IT'S
24 NOT DOUBLE COUNTING BECAUSE CONGRESS, IN FORMULATING THESE
25 GUIDELINES, DIDN'T CONSIDER IT TO BE DOUBLE COUNTING AND

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1 SPECIFICALLY PROVIDED THAT AS TO THESE TYPES OF OFFENSES,
2 WHEN YOU'RE DEALING WITH MULTIPLE MINORS, EACH MINOR IS
3 SUPPOSED TO BE TREATED SEPARATELY.

4 I THINK WHERE I'M SORT OF GETTING CONFUSED HERE IS
5 THAT IT'S NOT JUST LOOKING AT CHAPTER 3, PART D, IN A
6 VACUUM.

7 I THINK YOU HAVE TO LOOK AT 2G1.3(D) FOR THE
8 SPECIAL INSTRUCTION TO SEE HOW WE ARE SUPPOSED TO TREAT
9 CHAPTER 3, PART D, THE MULTIPLE COUNT ADJUSTMENT.

10 AND THAT SECTION, 2G1.3(D), SPECIFICALLY STATES
11 THAT EACH MINOR IS SUPPOSED TO BE TREATED AS IF CONTAINED IN
12 A SEPARATE COUNT OF CONVICTION.

13 NOW, WHEN THE COURT LOOKS AT THE APPLICATION NOTE
14 FOR 2G1.3(D), IT ALSO STATES THAT THE MINORS THAT WE'RE
15 TALKING ABOUT DO NOT EVEN HAVE TO BE SPECIFICALLY STATED IN
16 THE INDICTMENT. IT'S ENOUGH THAT WE POINT -- I'LL READ IT
17 JUST SO I DON'T MISQUOTE IT --

18 **THE COURT:** BUT IN THIS CASE, ALL OF THESE MINORS
19 THAT WE'RE TALKING ABOUT WERE IDENTIFIED IN THE INDICTMENT.

20 **MS. PEACE GARNETT:** YES. THEY WERE NOT
21 IDENTIFIED -- MINORS C THROUGH F WERE NOT IDENTIFIED IN
22 COUNT 10, BUT THEY WERE IDENTIFIED IN COUNTS 6 THROUGH 9.

23 BUT, AGAIN, 2G1.3 PROVIDES THEY DO NOT HAVE TO BE
24 STATED IN COUNT 10, AND MINOR B DOES NOT HAVE TO BE STATED
25 IN COUNT 4, ALTHOUGH HE WAS THE SUBJECT OF COUNT 5, WHICH

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1 WAS DISMISSED.

2 SO I THINK BEFORE YOU GET TO CHAPTER 3, PART D,
3 YOU HAVE TO GO TO 2G1.3(D) FOR THE SPECIAL INSTRUCTION THAT
4 SAYS EACH MINOR INVOLVED HERE, FOR PURPOSES OF RELEVANT
5 CONDUCT, HAS TO BE TREATED AS IF CONTAINED IN A SEPARATE
6 COUNT OF CONVICTION.

7 THEN FROM 2G1.3(D), IF THE COURT GOES TO THE
8 APPLICATION NOTE, IT SAYS (AS READ:)

9 "FOR PURPOSES OF CHAPTER THREE, PART D, MULTIPLE
10 COUNTS, EACH MINOR TRANSPORTED, PERSUADED, INDUCED,
11 ENTICED, OR COERCED TO ENGAGE IN" TRAVEL (SIC) EXCUSE
12 ME -- "IN A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL
13 CONDUCT IS TO BE TREATED AS A SEPARATE MINOR."

14 CONSEQUENTLY, MULTIPLE --

15 **THE COURT:** SEPARATE VICTIM.

16 **MS. PEACE GARNETT:** SEPARATE MINOR. IT SAYS,
17 "SEPARATE MINOR."

18 I'M READING FROM THE 2006 GUIDELINES, WHICH IS
19 WHAT PROBATION APPLIED.

20 CONSEQUENTLY, MULTIPLE COUNTS INVOLVING MORE THAN
21 ONE MINOR ARE NOT TO BE GROUPED TOGETHER UNDER 3D1.2.

22 IN ADDITION, SUBSECTION (D)(1) DIRECTS THAT
23 (AS READ:)

24 "IF THE RELEVANT CONDUCT OF AN OFFENSE OF CONVICTION
25 INCLUDES TRAVEL OR TRANSPORTATION TO ENGAGE IN A

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1 COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT IN
2 RESPECT TO MORE THAN ONE MINOR, WHETHER SPECIFICALLY
3 CITED IN THE COUNT OF CONVICTION, EACH SUCH MINOR SHALL
4 BE TREATED AS IF CONTAINED IN A SEPARATE COUNT OF
5 CONVICTION."

6 THIS WAS THE BASIS FOR THE GOVERNMENT'S ARGUMENT
7 THAT EACH OF THE MINORS SHOULD BE TREATED SEPARATELY, AND I
8 BELIEVE THIS WAS ALSO THE BASIS OF PROBATION'S ARGUMENT THAT
9 EACH OF THE MINORS SHOULD BE TREATED SEPARATELY.

10 SO I DON'T THINK WE CAN GO DIRECTLY TO CHAPTER 3,
11 PART D, AND SAY IT HAS TO FIT EXACTLY LIKE WE SEE IT THERE
12 BECAUSE 2G1.3 FOR CHILD EXPLOITATION CONTAINS THAT SPECIAL
13 INSTRUCTION THAT GIVES THE COURT SPECIFIC DIRECTION IN CHILD
14 EXPLOITATION CASES.

15 SO AS TO THE DOUBLE COUNTING ISSUE, I THINK IT'S
16 ANSWERED BY 2G1.3(D).

17 AND AS TO THE GROUPING ISSUE, I THINK IT'S ALSO
18 ANSWERED BY THE SPECIFIC GUIDELINES FOR CHILD EXPLOITATION.

19 **THE COURT:** LET ME ASK -- AND I DIDN'T RAISE THIS
20 BEFORE -- DO BOTH SIDES AGREE THAT THE APPLICABLE GUIDELINE
21 IS THE GUIDELINE OF 2006?

22 THAT DOES SEEM TO BE THE ONE THAT PROBATION USED
23 IN CALCULATING ITS GUIDELINES. AND, OF COURSE, WE'RE NOW AT
24 2010. SO THERE HAVE BEEN A LOT OF GUIDELINES IN BETWEEN.

25 BUT I THINK THE LAW -- AND, OF COURSE, THERE'S A

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1 RECENT CASE JUST THE OTHER DAY THAT KIND OF ADDRESSES
2 THIS -- THAT YOU WOULD USE THE LAW IN EFFECT AT THE
3 SENTENCING HEARING UNLESS THAT CREATES A VIOLATION OF
4 EX POST FACTO.

5 SO THE NEW CASE THAT I'M THINKING OF IS THE ONE
6 WHERE THE DEFENDANT WAS SENTENCED TO TEN YEARS. I GUESS IT
7 WAS A MANDATORY MINIMUM. AND HE'S NOW GOING TO BE MAYBE
8 RESENTENCED THE COURT SAYS, BUT IF HE WAS RESENTENCED TODAY,
9 THAT WOULDN'T APPLY.

10 BUT, OF COURSE, WE'RE NOT GOING TO LOOK AT THE LAW
11 ON THE SENTENCING DATE. WE'RE GOING TO LOOK AT THE LAW,
12 WHICH SEEMS A LITTLE BIT DIFFERENT THAN WHAT WE THOUGHT IT
13 WAS.

14 BUT, ANYWAY, MY REAL QUESTION IS DO YOU AGREE THAT
15 IT'S THE 2006 GUIDELINES THAT WE SHOULD BE LOOKING AT FOR
16 PURPOSES OF CALCULATING ALL THIS?

17 **MR. DYBWAD:** YES AS TO THE DEFENSE, YOUR HONOR.

18 **THE COURT:** OKAY.

19 AND THE GOVERNMENT BELIEVES ALSO?

20 **MS. PEACE GARNETT:** YES, YOUR HONOR.

21 **THE COURT:** ALL RIGHT.

22 SO I'VE HEARD THE GOVERNMENT'S ARGUMENT NOW.

23 IS THERE SOMETHING ELSE THE DEFENSE WANTS TO PUT
24 ON THE RECORD ON THIS ISSUE, OR IS IT YOUR POSITION IT'S
25 STILL DOUBLE COUNTING AND THAT'S IT?

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1 **MR. DYBWAD:** YOUR HONOR, IT'S OUR POSITION THAT
2 IT'S DOUBLE COUNTING, OR EVEN MORE SPECIFICALLY, THAT HERE
3 YOU HAVE A SITUATION WHERE ONE OF THE COUNTS IS EMBODYING
4 CONDUCT THAT IS COUNTED AS AN ADJUSTMENT.

5 AND, AGAIN, FOR THE REASONS WE DISCUSSED -- THAT
6 ONE OF THE COUNTS IS EMBODYING BOTH USE OF A MINOR AND ALSO
7 A PATTERN AND PRACTICE, WHICH THE PROBATION OFFICE
8 IDENTIFIED ON THE PRECISE BASIS OF JOHN DOES A THROUGH F --
9 THEREFORE, IT'S INAPPROPRIATE TO THEN HAVE THE MULTIPLE
10 COUNT ADJUSTMENT.

11 **THE COURT:** THERE'S SOME MORE RECENT DOUBLE
12 COUNTING CASES, AS WELL. AND I DON'T KNOW IF COUNSEL LOOKED
13 AT ANY OF THOSE CASES FOR HELPING US UNDERSTAND WHAT
14 CONSTITUTES DOUBLE COUNTING.

15 IN THE LAST FEW DAYS, IT SEEMS TO ME, I SAW
16 ANOTHER CASE FROM THE CIRCUIT THAT INVOLVES DOUBLE COUNTING.
17 IT MAY NOT BE APPLICABLE HERE, BUT I DON'T HAVE IT IN MIND
18 SUFFICIENTLY ENOUGH TO KNOW WHETHER IT APPLIES.

19 SO IF EITHER OF YOU BELIEVE THAT THERE ARE SOME
20 MORE RECENT CASES THAT MAY NOT HAVE BEEN IN THE POSITION
21 PAPERS THAT YOU FILED, JUST ON THE CONCEPT OF WHAT
22 CONSTITUTES DOUBLE COUNTING, IT MAY BE THAT THE COURT MAY
23 NEED TO TAKE A LOOK AT SOME OF THOSE JUST TO FOCUS ON WHEN
24 DO WE HAVE DOUBLE COUNTING, WHEN DO WE NOT HAVE DOUBLE
25 COUNTING.

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1 SO I DON'T ASK YOU TO RESPOND AT THIS MOMENT. I
2 WILL TAKE A BREAK. WE'RE NOT GOING TO FINISH THIS BEFORE
3 THERE IS A BREAK.

4 SO THINK ABOUT WHETHER THERE ARE ANY RECENT CASES,
5 CASES NOT CITED IN YOUR POSITION PAPER ON THE QUESTION OF
6 WHAT CONSTITUTES DOUBLE COUNTING. IF THERE ARE, IT MIGHT BE
7 WORTH LOOKING AT SOME OF THOSE CASES TO GIVE US GUIDANCE.

8 ALL RIGHT. THEN I THINK WHERE WE CAN GO NEXT -- I
9 THINK THAT ADEQUATELY ADDRESSES -- WELL, MAYBE I SHOULD
10 RAISE THIS.

11 SO WHAT THE COURT DID, THE COURT SAID, WELL, IN MY
12 TENTATIVE FINDINGS, I'M NOT ADJUSTING FOR THE MULTIPLE
13 COUNTS. SO NO MULTIPLE COUNT ADJUSTMENT FOR THE REASONS
14 THAT I SAID -- AND YOU'VE BEEN HEARD ON THAT -- BUT I SAID,
15 BUT I WILL ADJUST FOR PATTERN OF ACTIVITY, THE FIVE POINTS.

16 SO I'M NOT QUITE CLEAR, THEN, WHAT THE DEFENDANT'S
17 POSITION IS IF THE COURT'S TENTATIVE IS TO NOT ADJUST FOR
18 MULTIPLE COUNTS BUT TO MAKE THE ADJUSTMENT FOR PATTERN OF
19 ACTIVITY.

20 MAYBE YOUR ARGUMENT IS STILL THAT'S STILL DOUBLE
21 COUNTING, BUT I'M JUST NOT CLEAR ON THAT. SO WHY DON'T I
22 HAVE YOU COME TO THE LECTERN, AND WHAT IS YOUR POSITION ON
23 THAT?

24 **MR. DYBWAD:** YOUR HONOR, I'LL BE BRIEF.

25 OUR POSITION WAS THAT, IF THE COURT IS TO APPLY

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1 ONE, THE OTHER SHOULDN'T BE APPLIED.

2 HERE, THE COURT'S TENTATIVE IS TO APPLY THE
3 PATTERN AND PRACTICE BUT NOT THE MULTIPLE COUNTS. AND AS WE
4 LAID OUT IN OUR PAPERS, THE ARGUMENT IS SIMPLY YOU CANNOT
5 APPLY BOTH FIVE-LEVEL ENHANCEMENTS; BUT IF YOU APPLY ONE,
6 BUT NOT THE OTHER, THAT WOULD BE OKAY.

7 **THE COURT:** ALL RIGHT. SO I DON'T THINK THE
8 GOVERNMENT NEEDS TO BE HEARD ON IT, BUT IF YOU HAVE
9 SOMETHING MORE TO PUT ON THE RECORD ON THAT, PLEASE DO SO.

10 **MS. PEACE GARNETT:** YES, YOUR HONOR.

11 **THE COURT:** SO MY TENTATIVE WAS TO MAKE THE
12 ADJUSTMENT FOR PATTERN OF ACTIVITY, INCREASE THE FIVE
13 LEVELS, BUT NOT TO MAKE THE ADJUSTMENT FOR MULTIPLE COUNTS.

14 YOU'VE ADDRESSED THE MULTIPLE COUNTS AND WHY YOU
15 THINK THE COURT SHOULD MAKE THE ADJUSTMENT FOR THAT, AS WELL
16 AS PATTERN OF ACTIVITY.

17 AS I UNDERSTAND THE DEFENSE, THEY ARE NOT
18 OBJECTING AS LONG AS THE COURT DOESN'T DO BOTH.

19 DO YOU WISH TO ADDRESS PATTERN OF ACTIVITY?

20 **MS. PEACE GARNETT:** YES, YOUR HONOR.

21 I BELIEVE THE COURT SHOULD DO BOTH. I BELIEVE THE
22 COURT SHOULD APPLY THE MULTIPLE COUNT ADJUSTMENT, FOR THE
23 REASONS I STATED, AND ALSO THE PATTERN AND PRACTICE.

24 DOUBLE COUNTING ONLY OCCURS WHEN ONE PART OF THE
25 GUIDELINES IS APPLIED TO INCREASE DEFENDANT'S PUNISHMENT FOR

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1 HARM THAT HAS ALREADY BEEN ACCOUNTED FOR BY ANOTHER PART OF
2 THE GUIDELINES.

3 WHAT WE HAVE BEEN TALKING ABOUT THUS FAR IN TERMS
4 OF THE MULTIPLE COUNT ADJUSTMENT ARE HIS CONDUCT WITH
5 JOHN DOES A THROUGH F, AND WE'RE TALKING ABOUT SINGLE ACTS.

6 JOHN DOE A AND B WAS ON MAY 10, 2005.

7 JOHN DOE C, D, AND E WERE NOVEMBER 14, 2004.

8 AND JOHN DOE F WAS, I BELIEVE, DECEMBER 19, 2004.

9 THAT IS THE CONDUCT THAT WAS CHARGED. THAT IS THE
10 CONDUCT THAT IS THE BASIS OF THE MULTIPLE COUNT ADJUSTMENT.

11 BUT WE HAVE ALSO SHOWN IN OUR PAPERS THAT
12 DEFENDANT ENGAGED IN SEXUAL ACTS ON MULTIPLE OCCASIONS WITH
13 JOHN DOE A THAT IS NOT TAKEN INTO ACCOUNT.

14 HE ALSO ENGAGED IN MULTIPLE ACTS WITH JOHN DOE C,
15 I BELIEVE, A MINOR BY THE NAME OF KAY. SO THAT IS NOT TAKEN
16 INTO ACCOUNT.

17 WE HAVE ALSO SHOWN, BY THE LEDGERS AND THE INDEX
18 CARDS AND THE JOURNAL ENTRIES AND THE HUNDREDS OF PHOTOS --
19 ONLY AN EXCERPT OF WHICH ARE IN THE AMENDED DECLARATION --
20 THAT MR. PROWLER ENGAGED IN SEXUAL CONDUCT WITH HUNDREDS,
21 HUNDREDS OF MINORS OVER A FIVE-YEAR PERIOD; AND THAT IS NOT
22 TAKEN INTO ACCOUNT BY THE MULTIPLE COUNT ADJUSTMENT.

23 AND SO IT'S OUR POSITION THAT THE PATTERN AND
24 PRACTICE GOES TO HIS BEHAVIOR ON MULTIPLE OCCASIONS WITH THE
25 SAME VICTIM, WHICH HAS NOT BEEN TAKEN INTO ACCOUNT, AND AS

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1 TO MANY OTHER VICTIMS THAT HAVE NOT BEEN TAKEN INTO ACCOUNT.
2 AND UNDER U.S. V. STOTERAU, WHICH WAS A 2008 CASE, BUT I
3 WOULD LOOK DURING THE RECESS FOR SOMETHING MORE RECENT. I'D
4 LIKE TO PROVIDE THE CITE, AND THAT'S 524 F.3D 988.

5 **THE COURT:** LET ME ASK YOU TO REPEAT IT AGAIN,
6 PLEASE.

7 **MS. PEACE GARNETT:** 524 F.3D 988. IT'S A NINTH
8 CIRCUIT CASE IN 2008. AND IT'S U.S. VERSUS S-T-O-T-E-R-A-U.

9 AND IT SAYS THAT IT'S NOT DOUBLE COUNTING WHEN AN
10 ENHANCEMENT IS NECESSARY TO REFLECT THE FULL EXTENT OF
11 WRONGFULNESS OF THE DEFENDANT'S CONDUCT.

12 SO IT'S OUR POSITION THAT BOTH THE MULTIPLE COUNT
13 ADJUSTMENT AND THE PATTERN AND PRACTICE ARE APPLICABLE IN
14 THIS CASE BASED ON ALL OF HIS CONDUCT OVER THE FIVE-YEAR
15 PERIOD.

16 **THE COURT:** ALL RIGHT.

17 SO, THEN, THE DEFENSE WOULD LIKE TO BE HEARD. SO
18 WE'LL GO BACK TO SOME OF THE OTHER FINDINGS -- TENTATIVE
19 FINDINGS THAT THE COURT MADE THAT THE PARTIES HAVE NOT YET
20 ADDRESSED. THE VULNERABLE VICTIM. AND, OF COURSE, THE
21 COURT'S READ THE ARGUMENTS IN THE WRITTEN POSITION PAPER,
22 BUT YOU ALSO MAY HAVE SOME ADDITIONAL COMMENTS. MAYBE
23 THERE'S SOME MORE RECENT CASES THAT HAVE BEEN DECIDED SINCE
24 THE PAPERS WERE ACTUALLY PREPARED.

25 **MR. DYBWAD:** YES, YOUR HONOR.

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1 **THE COURT:** THIS IS VULNERABLE VICTIM.

2 **MR. DYBWAD:** YES, YOUR HONOR.

3 AND OBVIOUSLY THE COURT HAS READ OUR ARGUMENT. I
4 WILL BRIEFLY SUMMARIZE THE ARGUMENT AND THEN ADDRESS ONE
5 ARGUMENT THAT'S IN THE GOVERNMENT'S RESPONSE TO IT.

6 BASICALLY, YOUR HONOR, THE ARGUMENT IS THAT UNDER
7 EXISTING NINTH CIRCUIT CASE LAW, SPECIFICALLY UNITED STATES
8 V. CASTANEDA, UNITED STATES V. WILLIAMS, AND OTHER MANN ACT
9 CASES, IF THE VICTIM OF THE OFFENSE IS THE TYPE OF VICTIM
10 THAT IS TYPICALLY OR USUALLY ASSOCIATED WITH THE OFFENSE,
11 THE NINTH CIRCUIT ASSUMES THAT THAT CHARACTERISTIC HAS
12 ALREADY BEEN BUILT INTO THE BASE OFFENSE LEVEL TO THE
13 OFFENSE. SO TO, THEREFORE, ADD ANOTHER ENHANCEMENT ON THE
14 BASIS OF THAT TYPE OF VICTIM IS TO IGNORE THE REALITY THAT
15 IT'S BUILT IN THE BASE OFFENSE.

16 **THE COURT:** AND SO WHAT DO YOU BELIEVE IS THE
17 DESCRIPTION OF THE VICTIM THAT IS INCLUDED IN THE UNDERLYING
18 OFFENSE?

19 **MR. DYBWAD:** SOCIOECONOMIC STATUS, YOUR HONOR.
20 AND THAT IS PRECISELY THE GROUND THAT PROBATION IDENTIFIED
21 FOR THE ENHANCEMENT IN CONNECTION WITH THE ORIGINAL
22 SENTENCING. IT IS THE GROUND THAT THE GOVERNMENT IDENTIFIED
23 AS THE CHARACTERISTIC OF THE VICTIMS IN CONNECTION WITH THE
24 ORIGINAL SENTENCING.

25 AND IF THE COURT LOOKS AT SOME OF THE LEGISLATIVE

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1 HISTORY THAT WE CITED IN OUR PAPERS, BOTH IN FRONT OF
2 JUDGE TAKASUGI AS WELL AS HERE, THIS STATUTE, WHEN IT WAS
3 ENACTED, CONTEMPLATED THE VICTIMS. THE TYPICAL -- AS
4 LAMENTABLE AS IT IS, THE TYPICAL VICTIMS OF THE OFFENSE IN
5 ASIAN COUNTRIES BEING VICTIMS WHO WERE PREYED ON BECAUSE OF
6 THEIR SOCIOECONOMIC CIRCUMSTANCES.

7 THAT'S IN THE LEGISLATIVE HISTORY. I BELIEVE
8 THERE IS A STATEMENT BY REPRESENTATIVE ZOE LOFGREN TO THAT
9 EFFECT.

10 **THE COURT:** THE LEGISLATIVE HISTORY OF THE
11 CHARGING STATUTE AS CHARGED IN THE INDICTMENT?

12 **MR. DYBWAD:** OF THE CHARGING STATUTE.

13 AND, YOUR HONOR, THAT'S THE ARGUMENT I WANTED TO
14 ADDRESS THAT APPEARS IN THE GOVERNMENT'S RESPONSE ON
15 RESENTENCING IN FRONT OF THIS COURT.

16 ESSENTIALLY, THE GOVERNMENT ARGUES THAT THESE WERE
17 NOT TYPICAL VICTIMS OF THE OFFENSE BECAUSE THEY WERE NOT
18 PROSTITUTES AHEAD OF TIME AND REFERS BACK TO OTHER MANN ACT
19 STATUTES THAT OBVIOUSLY CRIMINALIZE BRINGING PEOPLE OVER FOR
20 PROSTITUTION.

21 THAT'S AT ODDS WITH BOTH THE CASTANEDA DECISION
22 ITSELF AND THE CASTANEDA DECISION DEALING WITH ANOTHER
23 PROVISION, SIMILAR PROVISION, THAT INVOLVED EXTENSIONS OF
24 THE MANN ACT.

25 THE VICTIMS OF THAT OFFENSE WERE NOT PROSTITUTES

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1 AHEAD OF TIME. THEY WERE TRICKED AND BROUGHT OVER TO
2 SAIPAN, AND THE DISTRICT COURT IMPOSED THE VULNERABLE VICTIM
3 ENHANCEMENT ON THE BASIS OF SOCIOECONOMIC STATUS, THEIR
4 SOCIOECONOMIC STATUS MAKING THEM MORE VULNERABLE TO THE
5 OFFENSE.

6 AND THE NINTH CIRCUIT SAID NO, THAT'S NOT CORRECT
7 AND CITED THE FIRST CIRCUIT AND SOME OTHER DECISIONS WHERE
8 THEY DISCUSSED THAT THE TYPICAL VICTIMS CONTEMPLATED BY THAT
9 STATUTE WERE OFTEN MARKED BY LOWER SOCIOECONOMIC STATUS,
10 SOMETIMES RUNAWAYS, SOMETIMES ADDICTED TO NARCOTICS.

11 NOW, I AGREE THE PROPER INQUIRY HERE IS THAT THE
12 COURT NEEDS TO LOOK AT THE SPECIFIC STATUTE THAT MR. PROWLER
13 WAS CHARGED WITH AND THEN TO LOOK AT THE LEGISLATIVE HISTORY
14 AS TO WHAT ARE THE TYPES OF VICTIMS THAT WERE CONTEMPLATED
15 AS BEING VICTIMS OF THIS STATUTE.

16 AND I THINK THE LEGISLATIVE HISTORY REVEALS,
17 CONSISTENT WITH OTHER MANN ACT EXTENSIONS, THAT THE TYPE OF
18 VICTIMS THAT WERE CONTEMPLATED HERE WERE MINORS WHO WERE
19 PREYED UPON FOR MONEY.

20 AND THAT'S WHAT YOU HAVE.

21 WHETHER THE MINORS WERE PROSTITUTES BEFORE OR
22 AFTER THIS OFFENSE, THAT'S NOT THE PROPER INQUIRY. IT
23 WASN'T THE PROPER INQUIRY IN CASTANEDA.

24 THE PROPER INQUIRY IS WHAT IS THE TYPE OF MINOR
25 CONTEMPLATED. IT IS SOMEWHAT OF A LOWER SOCIOECONOMIC

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1 STATUS.

2 THERE ARE OTHER MANN ACT CASES DISCUSSING THIS
3 ENHANCEMENT THAT ALSO TALK ABOUT RUNAWAYS, HOMELESSNESS,
4 DRUG ADDICTION. THOSE ARE, AGAIN, LAMENTABLY, THE TYPE OF
5 CHARACTERISTICS TYPICALLY ASSOCIATED WITH THE VICTIMS OF THE
6 OFFENSE.

7 AND SO, YOUR HONOR, AT THIS POINT, I BELIEVE THAT
8 TO IMPOSE THAT FOUR-LEVEL ENHANCEMENT IS SOMETHING THAT IS
9 ALREADY BUILT INTO THE BASE OFFENSE LEVEL AND AT ODDS WITH
10 NINTH CIRCUIT CASE LAW.

11 **THE COURT:** AND WHAT IS THE CHARGING STATUTE?

12 **MR. DYBWAD:** 2423, YOUR HONOR.

13 THE LEGISLATIVE HISTORY -- I APOLOGIZE. THIS CASE
14 HAS OBVIOUSLY BEEN PENDING FOR A LONG TIME FOR ALL OF US.

15 THE LEGISLATIVE HISTORY AS TO THAT CHARGING
16 STATUTE IS CITED, I WOULD IMAGINE, BOTH IN THE DEFENSE'S
17 ORIGINAL PAPERS IN SUPPORT OF THIS ARGUMENT AS WELL AS THE
18 DEFENSE'S PAPERS ON RESENTENCING.

19 **THE COURT:** I JUST WANTED TO MAKE SURE THAT THE
20 LEGISLATIVE HISTORY THAT YOU ARE REFERENCING IS THE
21 LEGISLATIVE HISTORY OF THE STATUTE THAT WAS CHARGED IN THE
22 INDICTMENT.

23 **MR. DYBWAD:** YES.

24 AND, YOUR HONOR, I AGREE, I THINK THAT'S A PROPER
25 INQUIRY HERE.

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1 **THE COURT:** OKAY.

2 ALL RIGHT. GOVERNMENT, YOU MAY BE HEARD,
3 VULNERABLE VICTIM.

4 **MS. PEACE GARNETT:** ALL RIGHT. AS TO THE
5 VULNERABLE VICTIM, DEFENSE COUNSEL REFERRED TO CASTANEDA,
6 AND WHAT HE WAS TALKING ABOUT IN CASTANEDA, THE NINTH
7 CIRCUIT SAID THIS ABOUT THE LEGISLATIVE HISTORY. AND IT WAS
8 REFERRING TO ANOTHER CASE FROM THE FIRST CIRCUIT CALLED THE
9 SABATINO CASE.

10 AND IT SAYS (AS READ:)

11 "THE SABATINO CASE DISCUSSED THE LEGISLATIVE HISTORY OF
12 THE MANN ACT AT LENGTH AND CONCLUDED THAT THE ACT
13 EMBODIED A PATERNALISTIC ATTITUDE CONCERNING THE
14 PROTECTION OF WOMEN AND GIRLS WHO, BECAUSE OF THEIR
15 INNOCENCE, THEIR HARD LIVES, AND THEIR VULNERABILITY
16 WERE PARTICULARLY SUSCEPTIBLE TO BECOMING VICTIMS OF
17 UNSCRUPULOUS MEN AND WOMEN WHO WOULD TAKE ADVANTAGE OF
18 THEIR SITUATION FOR IMMORAL PURPOSES."

19 (END OF QUOTED MATERIAL.)

20 **MS. PEACE GARNETT:** AND I'M READING FROM
21 CASTANEDA, WHICH IS 239 F.3D 978. IT'S A 2001 CASE FROM THE
22 NINTH CIRCUIT, AND IT'S SPELLED C-A-S-T-A-N-E-D-A.

23 I THINK THE DIFFICULTY WITH THE VULNERABLE VICTIM
24 ENHANCEMENT IS THAT THE MANN ACT HAS SORT OF EVOLVED OVER
25 TIME AND THERE HAVE BEEN MANY AMENDMENTS TO THE MANN ACT,

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1 INCLUDING SOME OF THE CHILD EXPLOITATION STATUTES THAT WERE
2 CHARGED IN THIS CASE. BUT TRADITIONALLY IT WAS ENACTED TO
3 PROTECT THESE GIRL VICTIMS OF PROSTITUTION.

4 WHAT THE GOVERNMENT TRIED TO POINT OUT BY SAYING
5 THAT THE VULNERABLE VICTIM ENHANCEMENT APPLIED HERE IS THAT
6 THIS PARTICULAR DEFENDANT TARGETED HIS VICTIMS --

7 HE WAS AN ENGLISH TEACHER IN THAILAND. HE TAUGHT
8 5 TO 11 YEAR OLDS. HE ALSO TAUGHT PIANO, AND HE HAD ACCESS
9 TO THESE MINORS. BUT THESE ARE NOT THE INDIVIDUALS THAT HE
10 TARGETED FOR HIS SEXUAL EXPLOITATION BECAUSE, OBVIOUSLY,
11 THEY CAME FROM EDUCATED -- OR PRESUMABLY CAME FROM EDUCATED
12 FAMILIES AND COULD CAUSE PROBLEMS FOR HIM.

13 **THE COURT:** WHY DO YOU PRESUME THAT?

14 **MS. PEACE GARNETT:** I DON'T KNOW WHY. BUT THEY
15 THEMSELVES WERE EDUCATED BECAUSE THEY WERE LEARNING ENGLISH
16 AND WERE ABLE TO TAKE THE TIME TO LEARN ENGLISH AS OPPOSED
17 TO THE PARTICULAR VICTIMS THAT WE'RE TALKING ABOUT.

18 THE VICTIMS THAT WE'RE TALKING ABOUT WERE ON THE
19 STREETS; THEY LIVED ON THE STREETS OF THAILAND IN A
20 PARTICULAR INTERSECTION. AND DEFENDANT WOULD GO AND TROLL
21 THIS INTERSECTION AND LOOK FOR THESE KIDS AND TRY TO ENTICE
22 THEM TO COME BACK TO HIS HOME.

23 IN THE VICTIM IMPACT STATEMENT, SOME OF THE
24 VICTIMS TALKED ABOUT DEFENDANT SHOWING UP WITH ICE CREAM
25 BECAUSE THESE KIDS WERE HUNGRY.

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1 IF THE COURT RECALLS FROM THE PHOTOGRAPH THAT I
2 SHOWED YOU, I WANT TO SAY IT'S EXHIBIT "T," YOU HAVE THE
3 THREE MINORS. ONE OF THEM IS INCREDIBLY EMACIATED. YOU CAN
4 SEE HIS RIBS. THESE KIDS WERE HUNGRY, THEY WERE POOR, THEY
5 WERE USING SQUEEGEES IN THIS BUSY INTERSECTION TO EARN MONEY
6 FOR FOOD; AND THESE ARE THE KIDS THAT DEFENDANT TARGETED.

7 IN ONE OF HIS JOURNAL ENTRIES ON EXHIBIT "F,"
8 PAGE 41, I'LL JUST READ IT TO YOU AT THIS POINT.

9 JOURNAL ENTRY DATED DECEMBER 19, 2004; AGAIN, THE
10 SAME TIME PERIOD OF COUNT 10.

11 DEFENDANT SAYS (AS READ:)

12 *"IF I AM COUNTING CORRECTLY, I HAVE HAD SEX WITH NINE*
13 *OF THE ASOKE BOYS -- "*

14 THAT'S IN THIS PARTICULAR INTERSECTION.

15 *" -- SO FAR. FABULOUSLY, I'VE TOTALLY BEEN ABLE TO*
16 *PENETRATE AND LEAVE MY MARK ON THIS ONCE UNTOUCHABLE*
17 *GROUP OF SQUEEGEE BOYS."*

18 THEY WERE CALLED THE "SQUEEGEE BOYS" BECAUSE THEY
19 WEREN'T PROSTITUTES. THEY WERE USING SQUEEGEES TO GET
20 MONEY. BUT DEFENDANT WOULD GO AND TRY TO GIVE THEM FOOD,
21 NOODLES, AND ICE CREAM AND THAT SORT OF THING AND INVITE
22 THEM BACK TO HIS APARTMENT, GIVE THEM A SHOWER, AND THAT
23 SORT OF THING.

24 SO IT'S THE GOVERNMENT'S POSITION THAT HE TARGETED
25 THESE PARTICULAR INDIVIDUALS. AND AMONGST THOSE GROUPS, IN

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1 THE VICTIM IMPACT STATEMENT, AGAIN, SOME OF THESE VICTIMS
2 WERE ON GLUE, AND THEY WOULD SAY THAT HE WOULD ALLOW THEM TO
3 USE GLUE IN THE APARTMENT.

4 SO THAT IS THE BASIS FOR THE VULNERABLE VICTIM
5 ENHANCEMENT AND THAT THERE WERE MULTIPLE VICTIMS, AND SO
6 THAT'S WHY THERE WAS A TOTAL OF FOUR.

7 BUT I JUST WANT TO POINT OUT AS TO ALL --

8 **THE COURT:** TARGETED THEM BECAUSE OF THEIR
9 SOCIOECONOMIC STATUS?

10 **MS. PEACE GARNETT:** YES, YOUR HONOR.

11 CASTANEDA DIDN'T DECIDE WHETHER OR NOT THAT COULD
12 BE SOMETHING TO BE LOOKED AT BY THE COURT.

13 BUT AS TO ALL OF THE GUIDELINE CALCULATIONS, ONE
14 OF THE THINGS I WANT TO POINT OUT TO THE COURT IS THERE
15 IS -- AS THE PROBATION OFFICER POINTED OUT, AN UPWARD
16 DEPARTURE IS WARRANTED IN THE CASE.

17 **THE COURT:** WELL, I THINK -- AND I WILL GIVE
18 COUNSEL AN OPPORTUNITY TO TALK ABOUT THE UPWARD DEPARTURE,
19 BUT I ACTUALLY SEPARATE THAT FROM THE GUIDELINE CALCULATION.

20 SO I THINK WHAT WE'RE TALKING ABOUT NOW IS HOW DO
21 WE CALCULATE THESE GUIDELINES, WHAT APPLIES, ET CETERA.

22 BUT CERTAINLY BOTH COUNSEL WILL HAVE AN
23 OPPORTUNITY TO ADDRESS WHAT SHOULD THE SENTENCE BE WHEN THE
24 COURT CONSIDERS ALL OF THE OTHER FACTORS, OTHER THAN JUST
25 THE GUIDELINE CALCULATION.

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1 **MS. PEACE GARNETT:** OKAY. WELL, THEN, UNLESS THE
2 COURT HAS ANY OTHER QUESTIONS AS TO VULNERABLE VICTIM, I'LL
3 LEAVE THAT ALONE.

4 **THE COURT:** I'M NOT SURE THAT I FOLLOW THE
5 ARGUMENT.

6 THE DEFENSE'S POSITION IS WE'RE ALREADY -- THE
7 STATUTE --

8 WELL, MAYBE I SHOULD ADDRESS IT THIS WAY:

9 WE'RE LOOKING AT THE FACT THAT THEY WERE MINORS.
10 WE'RE ALSO LOOKING AT THE FACT OF THEIR SOCIOECONOMIC
11 STATUS. SO IF THE ARGUMENT IS THEY ARE VICTIMS BECAUSE OF
12 THAT, THEY'RE MINORS, BUT THEY'RE VULNERABLE BECAUSE OF THE
13 SOCIOECONOMIC STANDARD -- I THINK THAT'S THE GOVERNMENT'S
14 ARGUMENT.

15 AM I CORRECT?

16 **MS. PEACE GARNETT:** YES, YOUR HONOR.

17 **THE COURT:** AND DEFENSE'S ARGUMENT IS --

18 **MS. PEACE GARNETT:** WE CAN'T TAKE THAT INTO
19 ACCOUNT BECAUSE IT'S ALREADY TAKEN INTO ACCOUNT.

20 **THE COURT:** EXACTLY.

21 **MS. PEACE GARNETT:** I MEAN, I THINK IT'S A CLOSE
22 CASE. I THINK IT'S AN ISSUE THAT'S NOT CLEARCUT.

23 BUT, AGAIN, IF THE COURT IS NOT INCLINED, BASED ON
24 THOSE ARGUMENTS, TO IMPOSE THAT PARTICULAR ENHANCEMENT, THEN
25 I WOULD MAKE OTHER ARGUMENTS LATER ON.

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1 **THE COURT:** OKAY. VERY GOOD.

2 ANYTHING FURTHER FOR THE DEFENSE?

3 (PAUSE.)

4 **THE COURT:** AND I WAS GOING TO ASK THE
5 GOVERNMENT'S COUNSEL JUST TO IDENTIFY THE CHARGING STATUTE.
6 I HAVE NOT LOOKED AT THIS LEGISLATIVE HISTORY, BUT TO THE
7 EXTENT THAT THAT'S HELPFUL -- AND I SHOULD LOOK AT IT --
8 WHAT IS THE CHARGING STATUTE? I DON'T HAVE THE INDICTMENT
9 BEFORE ME.

10 **MS. PEACE GARNETT:** COUNT 4 WAS 2423(C), ENGAGING
11 IN ILLICIT SEXUAL CONDUCT WITH A MINOR IN A FOREIGN PLACE,
12 AND COUNT 10 WAS 2423(B) -- ALL UNDER TITLE 18, OF COURSE --
13 TRAVELING WITH INTENT TO ENGAGE IN ILLICIT SEXUAL CONDUCT IN
14 A FOREIGN PLACE.

15 SO COUNT 10 GOES TO THE TRAVEL AND WHAT HE DID
16 THERE, AND THEN COUNT 4 GOES TO WHAT HE DID THERE.

17 **THE COURT:** AND SO COUNT 4 OF THE STATUTE ITSELF,
18 2423(C), INCLUDES MINORS.

19 **MS. PEACE GARNETT:** YES.

20 **THE COURT:** I MEAN, THE BASIS FOR IT IS THEY'RE
21 MINORS.

22 **MS. PEACE GARNETT:** AND HE PLED GUILTY TO MINORS,
23 PLURAL.

24 **THE COURT:** ALL RIGHT. DEFENSE WISH TO BE HEARD
25 FURTHER?

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1 **MR. DYBWAD:** VERY BRIEFLY, YOUR HONOR.

2 WE IDENTIFIED, I BELIEVE -- ACTUALLY, IT'S MOST
3 LIKELY IN BOTH OF OUR PAPERS, BUT THE LEGISLATIVE HISTORY AT
4 H.R. REP. 107-525.

5 IN THERE, THERE'S A STATEMENT BY ZOE LOFGREN, WHO
6 STATED: IN CALIFORNIA, IT SEEMS TO BE MAINLY THE TRAVEL TO
7 ASIA WHERE THE CHILDREN ARE PREYED UPON FOR MONEY IN
8 CONNECTION WITH THE PASSAGE OF THAT PARTICULAR STATUTE.

9 THERE IS ALSO -- I BELIEVE, LEGISLATIVE HISTORY
10 CAN BE FOUND AT 2002 WESTLAW 1376220 FOR FUTURE REFERENCE.

11 AND IN SHORT, AGAIN, I AGREE WITH THE COURT'S
12 ANALYSIS. THE NINTH CIRCUIT CASES AND THE FIRST CIRCUIT
13 CASE THAT WE'RE CITING DEAL WITH OTHER PARTS OF THE MANN ACT
14 OR THIS IS, RATHER, AN EXTENSION OF THE MANN ACT.

15 AND THEIR DISCUSSION OF THE TYPICAL VICTIM IN
16 CONNECTION WITH THOSE OFFENSES ARE THE TYPICAL VICTIMS
17 CONTEMPLATED BY THOSE PRECISE STATUTES, BUT THE ANALOGY IS
18 HERE. THIS STATUTE CONTEMPLATED VICTIMS WHO WERE PREYED
19 UPON BECAUSE OF THEIR IMPOVERISHED STATUS.

20 **THE COURT:** ALL RIGHT.

21 AND DID THE DEFENSE WISH TO BE HEARD ON THE
22 TENTATIVE FINDINGS MADE BY THE COURT?

23 **MR. DYBWAD:** NO, YOUR HONOR. I WOULD SUBMIT ON
24 THE OTHER ENHANCEMENTS THE COURT IDENTIFIED.

25 **THE COURT:** OKAY.

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1 AND HOW ABOUT THE GOVERNMENT. DID THE GOVERNMENT
2 WISH TO BE HEARD? AND THIS IS JUST BASED UPON THE COURT'S
3 TENTATIVE, AS TO HOW THE COURT WOULD CALCULATE THE SENTENCE
4 UNDER THE GUIDELINES?

5 **MS. PEACE GARNETT:** IF THE COURT NEEDS FURTHER
6 DISCUSSION OF DOUBLE COUNTING, I WOULD ASK THAT IN THE BREAK
7 I BE ALLOWED TO DO SOME RESEARCH.

8 **THE COURT:** I THINK WE SHOULD JUST TAKE A LOOK TO
9 SEE IF THERE ARE SOME MORE RECENT CASES THAT WEREN'T CITED
10 ON DOUBLE COUNTING THAT YOU BELIEVE THE COURT SHOULD REVIEW.

11 AND IF YOU IDENTIFY ANY, THEN YOU'LL CITE THOSE,
12 AND THE COURT WILL TAKE A LOOK AT THEM.

13 **MS. PEACE GARNETT:** OKAY, YOUR HONOR.

14 **THE COURT:** IT'S ABOUT A QUARTER OF 1:00, AND
15 OBVIOUSLY WE HAVE OTHER THINGS THAT WE HAVE TO DO. WE HAVE
16 NOT BEEN IN SESSION TWO HOURS YET. SO I CAN KEEP GOING,
17 BREAK AT 1:00, AND THEN GIVE YOU TIME FOR LUNCH IF YOU NEED
18 TO HAVE LUNCH OR JUST BREAK FOR JUST A REST AND THEN COME
19 BACK AND CONTINUE ON, BUT I'M WILLING TO GO UNTIL 1:00
20 UNLESS SOMEONE WOULD LIKE TO TAKE A BREAK NOW.

21 **MS. PEACE GARNETT:** NO, YOUR HONOR.

22 **THE COURT:** OKAY.

23 WHY DON'T WE GO THEN TO THE CONDITIONS OF
24 SUPERVISED RELEASE. I THINK THAT'S THE OTHER AREA
25 SPECIFICALLY WHERE THE DEFENDANT OBJECTED. THE GOVERNMENT

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1 THEN FILED A RESPONSE TO THE DEFENDANT'S OBJECTIONS.

2 BUT LET ME ASK MR. LEVARIO -- AS I SAID, THE
3 PROBATION OFFICER, WHEN I SPOKE TO HIM THIS MORNING, HE SAID
4 BECAUSE PROBATION'S LETTER WAS PREPARED IN 2003, THAT
5 PROBATION --

6 OH, I SEE I HAVE THE DOCUMENT.

7 -- THE LANGUAGE THAT THEY WOULD USE FOR SIMILAR
8 CONDITIONS TODAY IS DIFFERENT.

9 SO LET ME JUST LOOK AT IT FIRST BECAUSE IT MAY BE
10 BETTER TO HAVE YOU HAVE IT IN WRITING, AND THEN YOU CAN
11 PROPERLY ADDRESS IT.

12 (PAUSE.)

13 **THE COURT:** I THINK WHAT I'LL DO IS ASK
14 MR. LEVARIO TO COPY WHAT PROBATION HAS PROVIDED TO THE COURT
15 SO THAT THE PARTIES CAN SEE IT, AND THEN I'LL GIVE YOU AN
16 OPPORTUNITY TO READ IT AND THEN ADDRESS IT LATER.

17 I THINK PROBATION'S POSITION IS THAT SINCE 2003,
18 THEY'VE DEVELOPED OTHER CONDITIONS OF COMPUTER MONITORING
19 PROGRAM RULES AND DEFENDANTS ARE BEING ASKED TO COMPLY WITH
20 THOSE DURING CONDITIONS OF SUPERVISED RELEASE.

21 SO SOME OF THE ARGUMENTS THAT MAY HAVE BEEN MADE
22 ORIGINALLY, THE LANGUAGE MAY BE SLIGHTLY DIFFERENT, AND YOU
23 MAY WANT TO ADDRESS THOSE TO THE EXTENT THAT THE COURT WILL
24 BE IMPOSING THE CONDITION AS MODIFIED.

25 BUT LET ME JUST COMMENT -- AND I WILL LET YOU READ

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1 IT DURING THE BREAK BECAUSE I THINK WE NEED TIME TO SEE
2 WHAT'S THE DIFFERENCE AS FAR AS THE LANGUAGE IS CONCERNED
3 AND TO KNOW WHETHER OR NOT THERE IS AN OBJECTION TO IT.

4 THERE CLEARLY ARE SOME CASES FROM THE NINTH
5 CIRCUIT THAT HAVE DISAPPROVED SOME LANGUAGE AND APPROVED
6 OTHER LANGUAGE, BUT I WANT TO JUST MENTION ONE BEFORE WE
7 TAKE THE BREAK.

8 ONE OF THE CONDITIONS HAD TO DO WITH THE PROBATION
9 OFFICER MONITORING WHAT THE DEFENDANT WOULD BE VIEWING ON
10 THE DEFENDANT'S COMPUTER.

11 AND I THINK THE ARGUMENT BY THE DEFENSE WAS WHY
12 USE THIS MONITORING EQUIPMENT; WHY NOT USE -- LET ME GET IT
13 RIGHT -- FILTERING SOFTWARE. THE ARGUMENT WAS FILTERING
14 SOFTWARE MAY BE LESS INVASIVE; IT MAY ALSO BE LESS COSTLY,
15 ET CETERA.

16 SO I SPECIFICALLY ASKED THE PROBATION OFFICER
17 ABOUT THAT, WHAT KIND OF EQUIPMENT ARE THEY USING.

18 IF I UNDERSTAND IT CORRECTLY, PROBATION SAID, WHEN
19 THEY DO THIS MONITORING, THEY WOULD HAVE THE MONITORING
20 DEVICES AS WELL AS THE FILTERING SOFTWARE. SO THEY WOULD
21 ACTUALLY HAVE BOTH. WHY?

22 HIS EXPLANATION IS THE FILTERING SOFTWARE IS
23 SOMETHING THAT PARENTS PUT ON COMPUTERS TO RESTRICT THE USE
24 FOR CHILDREN BUT THAT A SOPHISTICATED PERSON WOULD BE ABLE
25 TO DISARM THAT.

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1 THEY THINK IT'S LESS LIKELY THAT THEY WOULD DISARM
2 THE, IN QUOTES, "MONITORING EQUIPMENT." SO IF THE FILTERING
3 SOFTWARE FAILS, THEY HAVE THE OTHER PIECE OF EQUIPMENT, AND
4 PROBATION WOULD STILL BE ABLE TO SEE WHAT A DEFENDANT IS
5 LOOKING AT ON THE COMPUTER.

6 SO THAT'S THEIR EXPLANATION FOR WHY THEY WOULDN'T
7 JUST USE THE FILTERING SOFTWARE AS OPPOSED TO THE
8 MONITORING.

9 BUT WHAT MR. LEVARIO HAS JUST GIVEN YOU MAY EVEN
10 ADDRESS IT MORE FULLY, AND YOU MAY HAVE DIFFERENT ARGUMENTS
11 THAT YOU WANT TO FOCUS ON.

12 LET ME LOOK AT SOME OF THE OTHERS, AND I CAN TELL
13 YOU THE ONES THAT I THOUGHT PROBABLY NEEDED SOME
14 MODIFICATION AND WHERE THE COURT IS WITH THIS.

15 SO CONDITION NO. 4 WAS ONE OF THOSE. AND WHEN I
16 SAY "NO. 4," I'M LOOKING AT THE JUDGMENT AND COMMITMENT
17 ORDER THAT WAS PREPARED AT THE OTHER SENTENCING HEARING.

18 SO CONDITION NO. 4 WAS ONE OF THOSE TO WHICH THE
19 DEFENDANT OBJECTED, BUT IT ALSO LOOKS LIKE IT'S ONE WHERE
20 PROBATION HAS SLIGHTLY CHANGED THE LANGUAGE THAT THEY WOULD
21 RECOMMEND TO THE COURT.

22 SO I WON'T GO FURTHER WITH THAT BECAUSE I WANT YOU
23 TO BE ABLE TO LOOK AT THE LANGUAGE.

24 CONDITION NO. 5 IS THE SEARCH AND SEIZURE, AND
25 THIS IS THE ONE THAT HAS TO DO WITH MONITORING VERSUS

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1 FILTERING SOFTWARE. AND, AGAIN, IT LOOKS LIKE THE LANGUAGE
2 IS SLIGHTLY DIFFERENT. SO I WON'T GO ANY FURTHER WITH THAT
3 ONE.

4 THE NEXT ONE THAT THE DEFENSE OBJECTED TO WAS
5 NO. 6, CONDITION NO. 6. AND THE LANGUAGE USED WAS:

6 "DEFENDANT SHALL NOT ACCESS VIA COMPUTER ANY MATERIAL
7 THAT RELATES TO CHILD PORNOGRAPHY."

8 SO IN ONE OF THE NINTH CIRCUIT CASES, IN YODER, I
9 THINK, Y-O-D-E-R, IN 2007, THE NINTH CIRCUIT SEEMED TO
10 PREFER LANGUAGE "ANY MATERIAL THAT RELATES TO DEPICTIONS OF
11 CHILD PORNOGRAPHY."

12 SO IF I WERE IMPOSING THAT CONDITION, I WOULD
13 PROBABLY CHANGE THE LANGUAGE CONSISTENTLY.

14 ANOTHER CASE FROM THE CIRCUIT IS COPE, C-O-P-E,
15 AND I THINK THESE CASES ARE CITED IN YOUR PAPERS.

16 SO THE CONCERN I THINK THAT DEFENSE EXPRESSED IS
17 THAT THE CONDITION SEEMS TO BE SO BROAD IT'S OVERBROAD,
18 BECAUSE DEFENDANT BELIEVES THAT THERE WOULD BE MATERIALS
19 THAT THE DEFENDANT MAYBE COULD NOT USE WITHOUT VIOLATING
20 THAT CONDITION THAT CLEARLY WE WEREN'T REFERENCING.

21 SO THE COURT WOULD BE INCLINED TO MODIFY, IF THE
22 COURT WERE GOING TO IMPOSE THAT CONDITION, TO PERMIT THE
23 DEFENDANT TO KEEP THINGS LIKE JOURNALS OR PARTICIPATE IN
24 WRITINGS OF A SEXUAL AUTOBIOGRAPHY THAT IS NOT CHILD
25 PORNOGRAPHY.

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1 SO SOME MODIFICATION TO THAT TO COVER THE
2 OBJECTION THAT WAS RAISED.

3 CONDITION NO. 7 IS THE CONDITION -- THIS CONDITION
4 I BELIEVE WAS APPROVED IN THAT REARDEN CASE, R-E-A-R-D-E-N,
5 FROM THE NINTH CIRCUIT. SO I WASN'T PLANNING TO MAKE ANY
6 MODIFICATION TO THAT LANGUAGE.

7 THE LANGUAGE THAT'S SOMEWHAT TROUBLING AND IN A
8 LOT OF THESE CASES WITH CONDITIONS OF SUPERVISED RELEASE,
9 WHEN PROBATION SAYS, "WITHOUT THE PRIOR APPROVAL OF
10 PROBATION." I SOMETIMES THINK THAT ALL PROBATION IS SAYING
11 IS ASK ME AND I MAY GIVE YOU THE APPROVAL, AND THEN YOU CAN
12 DO IT.

13 BUT WHEN WE READ IT, WE MAY BE THINKING THAT WHAT
14 PROBATION IS SAYING -- THAT WE ARE GIVING PROBATION TOO MUCH
15 DISCRETION.

16 SO THAT MAY BE ONE OF THE CONCERNS THAT YOU MAY
17 HAVE, AND SO WE COULD CERTAINLY TRY TO USE SOME LANGUAGE
18 THAT WOULD INDICATE THAT WE'RE NOT JUST LEAVING IT UP TO
19 PROBATION TO DECIDE WHEN, BUT THAT PROBATION COULD CERTAINLY
20 ALLOW THE DEFENDANT TO USE SOMETHING THAT THE COURT HAS
21 SAID -- PRECLUDED FROM USING BECAUSE PROBATION NOW THINKS
22 IT'S APPROPRIATE FOR YOU TO DO THAT.

23 SO THAT WAS TROUBLING, AND WE MAY JUST WANT TO
24 ADJUST THE LANGUAGE.

25 BUT NO. 9 WAS THE OTHER ONE THAT WAS OBJECTED TO

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1 THAT I WANTED TO ADDRESS.

2 "DEFENDANT SHALL PARTICIPATE IN A
3 PSYCHOLOGICAL/PSYCHIATRIC COUNSELING OR A SEX OFFENDER
4 TREATMENT PROGRAM WHICH MAY INCLUDE INPATIENT TREATMENT,"
5 THEN THE LANGUAGE "AS APPROVED AND DIRECTED BY PROBATION."

6 AND I THINK THE CONCERN WAS THAT DEFENDANT OBJECTS
7 TO THIS CONDITION TO THE EXTENT THAT IT REQUIRES INPATIENT
8 TREATMENT, PSYCHOLOGICAL TESTING, POLYGRAPH TESTING.

9 NOW, IT APPEARS THAT THE NINTH CIRCUIT NOW,
10 THROUGH CASES, HAS ACTUALLY APPROVED OF SOME OF THESE
11 CONDITIONS, OR AT LEAST HAVE SAID THAT IT WASN'T ERROR FOR
12 THE COURT TO IMPOSE THEM. SO IT SEEMS TO BE SUPPORTED BY
13 NINTH CIRCUIT AUTHORITY.

14 BUT IF THE CONCERN WAS WHO DECIDES WHETHER OR NOT
15 THE DEFENDANT NEEDS THIS TYPE OF TREATMENT, SHOULD IT BE
16 PROBATION, SHOULD IT BE AT A HIGHER LEVEL, SOMEONE THAT HAS
17 MORE EXPERIENCE OR EXPERTISE IN THIS AREA, THEN OBVIOUSLY WE
18 COULD MAKE SOME ADJUSTMENT IF WE NEEDED TO ADJUST THAT
19 LANGUAGE.

20 THE COURT HAS SAID -- NINTH CIRCUIT HAS SAID
21 LEAVING SOME OF THESE DECISIONS REGARDING WHETHER THE
22 DEFENDANT SHOULD BE AN INPATIENT IN PROBATION'S HANDS COULD
23 BE UNCONSTITUTIONAL, ESPECIALLY IF THERE'S SOME REQUIREMENT
24 THAT THERE WOULD BE PRESCRIBED MEDICATION.

25 SO I THINK WE COULD MODIFY LANGUAGE, TO THE EXTENT

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1 THAT WE NEED TO, TO MAKE SURE THAT IT IS NOT BROADER THAN IT
2 SHOULD BE.

3 INCLUDED IN THAT CONDITION, NO. 9, IS THE LANGUAGE
4 THAT "AS DIRECTED BY PROBATION" -- LET'S SEE.

5 THE LANGUAGE IS THAT "DEFENDANT SHALL TAKE ALL
6 PRESCRIBED MEDICATION AS DIRECTED BY PROBATION." BUT MAYBE
7 THE FOCUS SHOULD BE SOMEONE ELSE WHO HAS THE AREA OF
8 EXPERTISE DECIDES IF THE MEDICATION IS NEEDED; AND IF THE
9 MEDICATION IS PRESCRIBED AND NEEDED, IT'S PROBATION THAT'S
10 JUST MONITORING THAT IT HAS TO BE TAKEN.

11 IF THERE IS CONCERN ABOUT ANTI-PSYCHOTIC OR
12 HORMONAL DRUGS, WE CAN CERTAINLY ADDRESS THOSE IN THE
13 LANGUAGE. THOSE COULD BE EXCLUDED, THOSE COULD REQUIRE
14 ACTUALLY A HEARING BY THE COURT, ESPECIALLY IF THE DEFENDANT
15 OBJECTS TO HAVING TO TAKE THOSE TYPES OF DRUGS.

16 I HAVE JUST SELECTED SOME OF THEM, BUT WHAT I'D
17 FIRST LIKE TO LET YOU DO IS READ NOW THE MOST RECENT
18 INFORMATION THAT WE'VE RECEIVED FROM PROBATION BASED UPON
19 THE LANGUAGE THAT THEY WOULD USE TODAY, ESPECIALLY AS TO
20 THESE CONDITIONS THAT HAVE TO DO WITH COMPUTER MONITORING OR
21 USE OF COMPUTERS.

22 NO. 12 SEEMS TO BE THE ONE THAT -- THE LANGUAGE IS
23 "DEFENDANT SHALL NOT POSSESS ANY MATERIALS INCLUDING
24 PICTURES, PHOTOGRAPHS, BOOKS, WRITINGS, DRAWINGS, VIDEOS, OR
25 VIDEO GAMES DEPICTING OR DESCRIBING CHILD PORNOGRAPHY."

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1 AND THE OBJECTION WAS THAT THIS CONDITION IS SO
2 BROAD THAT IT WOULD PREVENT THE DEFENDANT FROM POSSESSING
3 HIS OWN PRESENTENCE REPORT, INCLUDING ALL COPIES OF STATUTES
4 IN CASES HE MAY NEED IF HE WERE TO BRING A COLLATERAL
5 CHALLENGE TO THE SENTENCING.

6 AND I THINK THAT WE COULD MODIFY THE LANGUAGE TO
7 EXCLUDE THINGS THAT WE THINK MAY BE NECESSARY FOR HIM TO
8 HAVE IN HIS POSSESSION, READ, AND INCLUDE IN ANY DOCUMENT
9 THAT HE'S TRYING TO FILE WITH THE COURT.

10 CONDITION NO. 11 READS: *"THE DEFENDANT SHALL NOT*
11 *POSSESS ANY MATERIALS INCLUDING PICTURES, PHOTOGRAPHS,*
12 *BOOKS, WRITINGS, DRAWINGS, VIDEOS, VIDEO GAMES DEPICTING*
13 *AND/OR DESCRIBING SEXUALLY EXPLICIT CONDUCT."*

14 AND THE NINTH CIRCUIT CASES -- I THINK, AGAIN, THE
15 REARDEN CASE, R-E-A-R-D-E-N, HELD THAT THE DISTRICT COURT
16 DID NOT ERR IN LIMITING THE DEFENDANT'S POSSESSION OF
17 MATERIALS DEPICTING, IN QUOTES, "SEXUALLY EXPLICIT CONDUCT,"
18 END OF QUOTE. IT'S NOT VAGUE. IT'S NOT OVERBROAD.

19 IN THE BEE CASE, B-E-E, FROM THE NINTH CIRCUIT,
20 PROBABLY CITED IN YOUR PAPERS, THE CIRCUIT AFFIRMED THE
21 DISTRICT COURT'S IMPOSITION OF A CONDITION PROHIBITING A
22 DEFENDANT WHO HAD BEEN CONVICTED OF ENGAGING IN SEXUALLY
23 ABUSIVE CONDUCT WITH A MINOR UNDER THE AGE OF 12 FROM -- AND
24 THIS WAS THE LANGUAGE -- *"POSSESSING SEXUALLY STIMULATING OR*
25 *SEXUALLY ORIENTED MATERIAL,"* END OF QUOTE.

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1 SO TO THE EXTENT THAT YOU ARE ASKING THAT THE
2 COURT MODIFY ANY OF THE LANGUAGE SO THAT IT'S CONSISTENT
3 WITH DECISIONS FROM THE NINTH CIRCUIT WHERE CERTAIN LANGUAGE
4 HAS BEEN APPROVED, THEN, OF COURSE, THE COURT COULD ADDRESS
5 THAT.

6 SO WHY DON'T WE BREAK NOW, AND SINCE MOST OF YOU
7 KNOW I'M A NON-LUNCH EATER, HOW MUCH TIME WOULD YOU LIKE?

8 WE CAN BREAK FOR 30 MINUTES TO GIVE EVERYBODY AN
9 OPPORTUNITY TO REST, DO WHATEVER YOU NEED TO DO. IF YOU
10 NEED A LITTLE BIT MORE TIME, I CAN GIVE YOU A LITTLE BIT
11 MORE TIME. I JUST NEED TO KNOW WHEN TO ORDER YOU BACK.

12 **MR. DYBWAD:** THIRTY MINUTES WOULD BE FINE FOR THE
13 DEFENSE, YOUR HONOR.

14 **THE COURT:** OKAY. HOW ABOUT THE GOVERNMENT?

15 **MS. PEACE GARNETT:** YES, YOUR HONOR.

16 **THE COURT:** HOW ABOUT THE COURT REPORTER?

17 **THE COURT REPORTER:** THAT'S FINE, YOUR HONOR,
18 THANK YOU.

19 **THE COURT:** ALL RIGHT. THEN, OUR RETURN TIME WILL
20 BE 1:30. THANK YOU.

21 *(WHEREUPON AT 1:00 P.M.,*

22 *THE LUNCH RECESS WAS TAKEN.)*

23 *///*

24 *///*

25 *///*

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1 LOS ANGELES, CALIFORNIA; FRIDAY, JULY 30, 2010

2 1:30 P.M.

3 --OOO--

4 **THE COURT:** WE'RE ON THE RECORD, AND EVERYONE IS
5 HERE WHO NEEDS TO BE HERE IS HERE, THE DEFENDANT AND
6 COUNSEL, THE GOVERNMENT AND THE AGENT.

7 SO I THINK I'LL JUST PICK UP WHERE I LEFT OFF.

8 WE WERE JUST TALKING ABOUT THE CONDITIONS, AND I
9 PROVIDED YOU WITH JUST THIS ADDITIONAL INFORMATION FROM
10 PROBATION AS TO THE LANGUAGE THAT WOULD BE USED TODAY IF
11 THEY WERE ASKING FOR THESE CONDITIONS.

12 SO MY QUESTION WOULD BE WOULD THE OBJECTIONS BE
13 THE SAME THAT WERE RAISED BY THE DEFENDANT AND WOULD THE
14 ARGUMENTS BE THE SAME, OR IS THERE SOMETHING IN ADDITION TO
15 WHAT'S ALREADY BEFORE THE COURT THAT YOU WOULD PUT ON THE
16 RECORD CONCERNING ANY OF THESE CONDITIONS?

17 SO I'LL HEAR FROM THE DEFENSE FIRST.

18 SO YOU CAN ASSUME, FOR PURPOSES OF THIS QUESTION,
19 THAT THE CONDITIONS THAT WERE IMPOSED AT THE PRIOR SENTENCE
20 WOULD BE THE SAME CONDITIONS TO BE IMPOSED, EXCEPT I WOULD
21 MODIFY THE LANGUAGE CONSISTENT WITH WHAT PROBATION HAS
22 INDICATED TO US THE LANGUAGE WOULD BE TODAY, AND THEN THE
23 FEW COMMENTS THAT I MADE BEFORE WE TOOK OUR BREAK AS TO
24 CHANGING THE LANGUAGE SOMEWHAT.

25 **MR. DYBWAD:** I'LL TRY AND MAKE MY TIME PRODUCTIVE,

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1 YOUR HONOR.

2 THE PROPOSED CONDITION NO. 1 FROM THE PROBATION
3 OFFICE ABOUT COMPUTER-RELATED DEVICES....

4 **THE COURT:** WHICH I THINK IS NO. 4 IN THE JUDGMENT
5 AND COMMITMENT ORDER AT THE LAST SENTENCING, AND I HAVE THE
6 BENEFIT OF THE OBJECTION THAT YOU MADE TO THAT.

7 **MR. DYBWAD:** AND, YOUR HONOR, I WOULD AGREE WITH
8 THE PROBATION OFFICE'S CONDITION NO. 1 AS A REPLACEMENT.

9 **THE COURT:** OKAY. NO OBJECTION, THEN?

10 **MR. DYBWAD:** NO OBJECTION TO THAT.

11 **THE COURT:** OKAY.

12 **MR. DYBWAD:** NO. 2, AS PROPOSED BY PROBATION IN
13 THE DOCUMENT ENTITLED AS OF JULY 2010, I WOULD HAVE NO
14 OBJECTION TO THAT.

15 **THE COURT:** OKAY. AND I THINK THAT WAS CONDITION
16 NO. 5.

17 **MR. DYBWAD:** I BELIEVE THAT'S CORRECT.

18 CONDITION NO. 3 THAT IS IN THE DOCUMENT ENTITLED
19 "PROBATION OFFICE'S STANDARD COMPUTER CONDITIONS AS OF
20 JULY 2010," THAT IS A NEW ONE THAT I'VE SEEN. I'VE NOT SEEN
21 THIS ONE PREVIOUSLY.

22 MY OBJECTION WOULD BE, I SUSPECT, THAT AS WITH ANY
23 TIME YOU ORDER THE DEFENDANT TO PAY SOMETHING, IT HAS TO BE
24 BASED ON DEMONSTRATED FINANCIAL ABILITY TO PAY.

25 **THE COURT:** AND I WOULD AGREE WITH THAT. AND SO

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1 ONE OF THE QUESTIONS THAT I HAVE THAT WE SHOULD ADDRESS THIS
2 AFTERNOON IS THE DEFENDANT'S FINANCIAL STATUS AND HIS
3 ABILITY TO PAY. SO THE PART OF THE CONDITION THAT YOU ARE
4 OBJECTING TO IS THAT HE SHOULD PAY THE COSTS FOR THIS
5 COMPUTER MONITORING.

6 **MR. DYBWAD:** THAT'S CORRECT, YOUR HONOR.

7 **THE COURT:** OKAY.

8 **MR. DYBWAD:** AND AS TO CONDITION NO. 4, THERE
9 WOULD BE NO OBJECTION.

10 **THE COURT:** NOW, PROBATION ALSO ATTACHED FOR US
11 THESE GENERAL PROVISIONS, AND SO I HAVEN'T SEEN THIS BEFORE.

12 YOU MAY BE MORE FAMILIAR WITH THEM, BUT I GUESS
13 THESE ARE THE GENERAL PROVISIONS THAT PROBATION ASKS THE
14 DEFENDANTS TO AGREE TO THAT ARE BEING SUPERVISED ONCE THEY
15 HAVE COMPLETED THEIR CUSTODY SENTENCE. THEY ARE CALLED
16 GENERAL PROVISIONS.

17 SO DID YOU TAKE A LOOK AT THAT, AND DO YOU WANT TO
18 ADDRESS THOSE?

19 IT'S NOT A PART OF SOMETHING THAT I WOULD
20 ARTICULATE ON THE RECORD; BUT TO THE EXTENT THAT I'M SAYING
21 THE DEFENDANT SHOULD ALSO COMPLY WITH THE RULES AND
22 REGULATIONS OF PROBATION, THESE PROBABLY DO COME INTO PLAY.

23 **MR. DYBWAD:** AND, YOUR HONOR, I THINK I WOULD
24 DEFER TO THE COURT. THEY'RE NOT EXPLICITLY CODIFIED IN THE
25 SUPERVISED RELEASE CONDITIONS, AND AS A RESULT, SHOULD A

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1 PROBLEM ARISE LATER ON DOWN THE ROAD, I THINK THEY COULD BE
2 ADEQUATELY ADDRESSED AT THAT TIME.

3 **THE COURT:** ALL RIGHT. SO THE OTHER CONDITIONS OF
4 SUPERVISED RELEASE, I'M JUST ASSUMING THAT YOUR OBJECTIONS
5 WOULD BE THOSE THAT YOU PUT IN WRITING; BUT IF THERE ARE
6 FURTHER COMMENTS TO BE MADE ON ANY OF THEM, THIS IS THE TIME
7 TO DO SO.

8 **MR. DYBWAD:** NO, YOUR HONOR. THEY'RE BASICALLY
9 PUT IN WRITING.

10 MY MEMORY OF THEM IS THEY BOIL DOWN TO THE COPE
11 CASE, ESPECIALLY. ANY TIME THERE WAS LANGUAGE IN THE
12 ORIGINAL CONDITIONS ABOUT ANYTHING, FOR EXAMPLE, DESCRIBING
13 SEXUALLY EXPLICIT CONDUCT, IF THE LANGUAGE IN SOME OF THE
14 ORIGINAL CONDITIONS IS SO BROAD AS TO PREVENT -- FOR
15 EXAMPLE, POSSESSION OF A P.S.R. OR OTHER LEGAL PAPERS -- AND
16 TO THE EXTENT THAT THOSE ARE OVERBROAD, A CARVE-OUT OF AN
17 EXCEPTION TO THEM.

18 I THINK AS TO THE INPATIENT TREATMENT --

19 **THE COURT:** LET ME ASK YOU JUST BEFORE WE LEAVE
20 THERE BECAUSE -- I THINK THAT'S NO. 6.

21 SO WOULD YOU BE SATISFIED OR DOES IT CURE THE
22 CONCERN THAT YOU HAVE IF THE COURT WERE TO ADD SOME LANGUAGE
23 TO SAY THAT IT DOES NOT APPLY TO JOURNALS OR -- LET'S SEE.

24 "TO CLARIFY, THAT COPE MAY KEEP JOURNALS OR
25 PARTICIPATE IN THE WRITING OF A," IN QUOTES, "'SEXUAL

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1 AUTOBIOGRAPHY,' IF REQUIRED BY THE TREATMENT PROGRAM THAT
2 HE'S IN."

3 BECAUSE APPARENTLY COPE, THAT WAS ONE OF THE
4 ISSUES THAT, IF YOU'RE ORDERING A DEFENDANT TO PARTICIPATE
5 IN A TREATMENT PROGRAM AND ONE OF THE REQUIREMENTS OF THE
6 TREATMENT PROGRAM IS YOU KEEP SOME KIND OF JOURNAL OR
7 SOMETHING AND THE CONTENT OF THAT JOURNAL WOULD SEEM TO PUT
8 THE DEFENDANT IN VIOLATION OF THE CONDITION, THAT THERE
9 COULD BE LANGUAGE THAT WOULD SAY "EXCEPT AS REQUIRED BY ANY
10 SEX OFFENDER TREATMENT PROGRAM."

11 **MR. DYBWAD:** AS MR. COPE WAS ALSO ONE OF MY
12 CLIENTS, YOUR HONOR, I'M FAMILIAR WITH THE OPINION.

13 AND I THINK A CARVE-OUT THERE WOULD BE APPROPRIATE
14 AND AS WELL AS ANY LEGAL MATERIALS NECESSARY TO, I SUPPOSE,
15 A DIRECT APPEAL OR COLLATERAL ATTACK OF THE SENTENCE,
16 CONVICTION.

17 **THE COURT:** YOU MAY CONTINUE.

18 **MR. DYBWAD:** YOUR HONOR, AS TO THE INPATIENT
19 TREATMENT, JUDGE TAKASUGI ACTUALLY EXPLICITLY EXCLUDED ABEL
20 TESTING ON HIS OWN AT THE ORIGINAL SENTENCING.

21 I THINK THAT THERE IS A WAY TO MODIFY CONDITION 9
22 TO SIMPLY SAY "WHICH MAY INCLUDE INPATIENT TREATMENT AS
23 APPROVED AND DIRECTED BY THE PROBATION OFFICER," AND THEN
24 INSTEAD OF THE PERIOD, COMMA, "AND AS CONSENTED TO BY
25 DEFENSE COUNSEL" OR "AND WITH PRIOR CONSENT OF DEFENSE

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1 COUNSEL."

2 THE COURT: BY THE DEFENDANT AND COUNSEL?

3 MR. DYBWAD: BY THE DEFENDANT AND COUNSEL.

4 THE COURT: SO HERE, ARE YOU ASKING THAT THE COURT
5 NOT INCLUDE THE ABEL TESTING, OR YOU'RE OKAY WITH THE ABEL
6 TESTING AS LONG AS IT INCLUDES THE ADDITIONAL LANGUAGE OF
7 THE MODIFIER?

8 MR. DYBWAD: I WOULD ASK THAT THE ABEL TESTING
9 REMAIN EXCLUDED.

10 AND I BELIEVE BECAUSE IT WAS EXCLUDED THE FIRST
11 TIME -- I'M NOT SURE I ADDRESSED THE OPINIONS ON THIS. BUT
12 THERE ARE A NUMBER OF OPINIONS DOUBTING THE VALIDITY, THE
13 SCIENTIFIC VALIDITY OF ABEL TESTING.

14 THE COURT: OKAY. I HAVE TO ADMIT, I DON'T THINK
15 I KNOW WHAT ABEL TESTING IS. I HAVE SPOKEN TO PROBATION
16 ABOUT IT ON OTHER CASES, NOT THIS ONE. AND I'M NOT SURE
17 THAT PROBATION EVEN DOES IT ALL THE TIME, WHATEVER IT IS.

18 ALL RIGHT. YOU MAY CONTINUE.

19 MR. DYBWAD: AND, I GUESS, NOW I'M TURNING MY
20 ATTENTION TO CONDITION NO. 10.

21 THE COURT: THE CAUSE PART OF IT I THINK HAS THE
22 SAME ISSUE.

23 MR. DYBWAD: THE CAUSE PART OF IT WAS THE
24 OBJECTION AND THE SAME OBJECTION RAISED EARLIER.

25 NO. 11, THE OBJECTION FALLS BACK INTO THE

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1 "DEPICTING AND/OR DESCRIBING." AND I WOULD ASK FOR THE SAME
2 CARVE-OUT THAT WE DISCUSSED EARLIER FOR JOURNALS AS PART OF
3 ANY TREATMENT PROGRAM AS WELL AS MATERIALS THAT WOULD BE
4 NECESSARY FOR A DIRECT APPEAL OR COLLATERAL ATTACK OF THE
5 SENTENCE, LEGAL MATERIALS.

6 **THE COURT:** WHAT ABOUT THE LANGUAGE. THE LANGUAGE
7 THAT PROBATION USES IS, IN QUOTES, "*SEXUALLY EXPLICIT*
8 *CONDUCT*," END OF QUOTE.

9 IN SOME OF THE CASES, THE NINTH CIRCUIT SEEMS TO
10 BE APPROVING OF THE LANGUAGE SUCH AS "*SEXUALLY STIMULATING*
11 *OR SEXUALLY ORIENTED MATERIALS*."

12 SO IS THE LANGUAGE SOMETHING YOU ARE CONCERNED
13 ABOUT, OR WAS IT JUST THAT IT NOT BE TOO BROAD SO THAT
14 DEFENDANT COULD, IN FACT, KEEP JOURNALS, CONSULT OR WRITE ON
15 THOSE THINGS THAT MAY BE NECESSARY FOR A TREATMENT PROGRAM
16 AS WELL AS TO ADDRESS THE LEGAL ISSUES?

17 **MR. DYBWAD:** YOUR HONOR, I BELIEVE THE OBJECTION
18 WAS A COMBINATION OF WHAT THE COURT TALKED ABOUT. IT SAID:
19 THE WORD DESCRIBING WHEN IN CONNECTION WITH THE TERM
20 SEXUALLY EXPLICIT CONDUCT CAN, IN SOME CIRCUMSTANCES, BECOME
21 TOO BROAD.

22 I BELIEVE THE REFERENCE TO "*SEXUALLY EXPLICIT*
23 *CONDUCT*" REFERS BACK TO THE STATUTE WHICH THEN LAYS OUT
24 FACTORS.

25 **THE COURT:** SO THE LANGUAGE THAT APPARENTLY HAS

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1 BEEN APPROVED -- I GUESS APPROVED BY THE NINTH CIRCUIT IS
2 "*SEXUALLY STIMULATING OR SEXUALLY ORIENTED MATERIALS.*"

3 DOES THAT HELP?

4 **MR. DYBWAD:** YOUR HONOR, I THINK MY POSITION WOULD
5 STILL BE THAT, WHEN COMBINED WITH THE WORD "*DESCRIBING,*"
6 IT'S TOO BROAD. BUT I WOULD SUBMIT.

7 **THE COURT:** OKAY.

8 **MR. DYBWAD:** THEN AS TO NO. 12, AGAIN, MY
9 OBJECTION WOULD BE THE SAME, DESCRIBING CHILD PORNOGRAPHY,
10 BOTH SHOULD BE SUBJECT TO THE AUTOBIOGRAPHY CARVE-OUT AND
11 THE LEGAL MATERIAL CARVE-OUT.

12 AND THEN I WOULD SIMPLY ALSO OBJECT THAT IT'S
13 POTENTIALLY VAGUE TO SAY, FOR EXAMPLE, A "NEW YORK TIMES"
14 ARTICLE COULD DESCRIBE CHILD PORNOGRAPHY IN THE BROADEST
15 SENSE, AND A BROAD READING OF THAT CONDITION WOULD PROHIBIT
16 MR. PROWLER FROM POSSESSING THAT.

17 **THE COURT:** ALL RIGHT.

18 **MR. DYBWAD:** AS TO THE OTHERS, I THINK MY
19 OBJECTIONS ARE NOTED FOR THE RECORD. I DON'T NEED TO REPEAT
20 THEM HERE.

21 **THE COURT:** OKAY.

22 DOES THE GOVERNMENT WISH TO ADDRESS THE CONDITIONS
23 OF SUPERVISED RELEASE EITHER AS COULD BE MODIFIED BASED ON
24 THE DOCUMENT PROBATION GAVE US OR THE COMMENTS THAT DEFENSE
25 COUNSEL HAS MADE OR JUST ANY NEW LAW OR ANYTHING ELSE THAT

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1 WOULD SUGGEST THAT THE LANGUAGE SHOULD BE DIFFERENT?

2 **MS. PEACE GARNETT:** JUST BRIEFLY, YOUR HONOR.

3 AS TO CONDITION NO. 9, GOVERNMENT WOULD OBJECT TO
4 INCLUDING A CONDITION THAT ABEL TESTING OR ANY OTHER
5 INPATIENT TESTING BE GIVEN ONLY AT THE CONSENT OF DEFENDANT
6 AND HIS COUNSEL FOR THE REASONS STATED IN ITS PAPERS,
7 SPECIFICALLY, THAT IT SHOULD BE THE PARTICULAR TREATMENT
8 FACILITY THAT DECIDES WHETHER OR NOT SUCH TREATMENT IS
9 APPROPRIATE.

10 THE NINTH CIRCUIT HAS AFFIRMED THE USE OF ABEL
11 TESTING. WHERE THE ISSUE COMES IN IS WHEN PLETH- -- LET ME
12 GET THE ACTUAL LANGUAGE HERE -- PLETHYSMOGRAPHY TESTING IS
13 USED. AND I BELIEVE THAT IS WHERE A DEVICE IS AFFIXED TO
14 THE DEFENDANT'S PRIVATE PARTS AND HE'S SHOWN PICTURES TO
15 DETERMINE WHETHER OR NOT HE'S STIMULATED. I THINK THAT IS
16 THE ONLY ONE THAT HAS COME UNDER FIRE.

17 AND SO THE GOVERNMENT HAS NO OBJECTION TO THE
18 COURT PRECLUDING THAT SORT OF TESTING, BUT AS TO THE OTHER
19 TYPES OF TESTING, I BELIEVE IT'S APPROPRIATE.

20 **THE COURT:** I DON'T THINK THAT WAS ACTUALLY
21 INCLUDED ANYWHERE. I WAS LOOKING FOR IT, BUT I DIDN'T --

22 **MS. PEACE GARNETT:** IT DIDN'T REALLY DEFINE IT.
23 BUT JUST, YOU KNOW, THAT'S WHERE THERE HAS BEEN AN ISSUE.

24 BUT ABEL TESTING -- I BELIEVE WE CITED CASES FROM
25 THE NINTH CIRCUIT WHERE ABEL TESTING WAS AFFIRMED.

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1 **THE COURT:** YES, AND I UNDERSTAND THAT THE NINTH
2 CIRCUIT HAS FOUND IT TO BE CONSTITUTIONAL.

3 **MS. PEACE GARNETT:** AS TO CONDITION NO. 11, THE
4 USE OF SEXUALLY EXPLICIT CONDUCT, I THINK, WOULD BE THE MOST
5 APPROPRIATE WAY TO DETERMINE THE TYPES OF MATERIALS THAT
6 SHOULD BE PRECLUDED, AND THAT WAS ALSO AFFIRMED BY THE NINTH
7 CIRCUIT IN THE REARDEN CASE.

8 IN THAT CASE, THE PARTICULAR CONDITION PRECLUDED
9 THE DEFENDANT FROM POSSESSING ANY MATERIALS THAT DEPICTED
10 SEXUALLY EXPLICIT CONDUCT.

11 I THINK IF WE ADDED LANGUAGE THAT SAID DEFENDANT
12 WAS PRECLUDED FROM POSSESSING SEXUALLY STIMULATING CONDUCT,
13 THEN IT BECOMES A LITTLE BIT MORE FOGGY BECAUSE IT'S NOT
14 DEFINED BY THE STATUTE WHERE SEXUALLY EXPLICIT CONDUCT IS
15 DEFINED; AND THEN YOU'RE ALSO -- IT BECOMES SUBJECTIVE AS TO
16 WHAT STIMULATES THE DEFENDANT.

17 AS TO CONDITION NO. 11, THE GOVERNMENT'S POSITION
18 IS THAT IT SHOULD REMAIN AS IS.

19 AS TO CONDITION NO. 12, WE AGREE THAT SOME
20 MODIFICATION OF THE LANGUAGE WOULD BE APPROPRIATE TO ALLOW
21 THE DEFENDANT TO POSSESS A P.S.R. OR JOURNAL OR THAT SORT OF
22 THING.

23 AND I BELIEVE I STATED IN OUR POSITION OR RESPONSE
24 TO THE DEFENDANT'S OBJECTION SOME LANGUAGE THAT WE THINK
25 WOULD BE APPROPRIATE, AND I THINK IT'S IN LINE WITH WHAT THE

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1 COURT AND PROBATION ARE CURRENTLY USING.

2 AND AS TO THE REMAINDER OF THE CONDITIONS, THE
3 GOVERNMENT WOULD SUBMIT ON ITS PAPERS.

4 **THE COURT:** OKAY. ALL RIGHT.

5 BASED UPON THE COURT'S TENTATIVE AS TO HOW THE
6 COURT WOULD CALCULATE THE GUIDELINES AND IF THE GUIDELINE
7 RANGE IS BASED UPON THE COURT'S CALCULATION, 151 TO 188
8 MONTHS, I WOULD LET BOTH SIDES NOW BE HEARD CONSIDERING
9 OTHER FACTORS THAT NEED TO BE CONSIDERED AND MAYBE EVEN SOME
10 OF THE THINGS THAT WE'VE ALREADY TALKED ABOUT, WHAT THE
11 APPROPRIATE SENTENCE SHOULD BE, SPECIFICALLY LOOKING AT
12 18 UNITED STATES CODE 3553(A).

13 AND MAYBE I'LL MAKE IT EVEN A LITTLE BIT BROADER.

14 IF WE LOOK AT THE COURT'S TENTATIVE GUIDELINE
15 CALCULATION, YOU MAY ALSO LOOK AT YOUR OWN GUIDELINE
16 CALCULATION AND DISCUSS THE 18 UNITED STATES CODE 3553(A)
17 FACTORS TO INDICATE TO THE COURT WHAT YOU THINK THE
18 APPROPRIATE SENTENCE SHOULD BE AND WHY YOU THINK THAT IS THE
19 APPROPRIATE SENTENCE.

20 SO THIS WOULD BE THE APPROPRIATE TIME FOR
21 GOVERNMENT'S COUNSEL -- AND YOU RAISED THIS ISSUE EARLIER --
22 IF THE COURT DOES NOT INCREASE UNDER THE GUIDELINES FOR
23 CERTAIN CONDUCT, THAT YOU WOULD LIKE TO ADDRESS AN UPWARD
24 DEPARTURE.

25 SO I'LL HEAR FROM THE DEFENSE FIRST, AND THEN I'LL

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1 HEAR FROM THE GOVERNMENT.

2 SO THIS IS APPROPRIATE SENTENCE BASED ON THE
3 CALCULATION OF THE GUIDELINES EITHER AS PROBATION HAS
4 CALCULATED THEM, THE DEFENSE CALCULATED THEM, OR THE COURT
5 HAS CALCULATED THEM, UPWARD DEPARTURE, DOWNWARD DEPARTURE,
6 3553 FACTORS.

7 AND I DID NOT SAY EARLIER, BUT I WANTED TO SAY
8 THAT THE MOST RECENT DOCUMENT THAT WAS FILED WITH THE COURT
9 RE SENTENCING, THE ONE FILED YESTERDAY, IT DOES INCLUDE
10 LETTERS -- A LETTER FROM THE DEFENDANT'S FATHER, A LETTER
11 FROM THE DEFENDANT'S MOTHER. I JUST WANTED THE RECORD TO
12 REFLECT THAT I DID READ THOSE LETTERS.

13 IT ALSO INCLUDED SOME CERTIFICATES, THINGS THE
14 DEFENDANT HAS DONE AND COMPLETED SINCE HE'S BEEN IN THE
15 BUREAU OF PRISONS AWAITING SENTENCE.

16 I DID READ THOSE, AND THEY ARE CONSIDERED FOR
17 SENTENCING PURPOSES.

18 **MR. DYBWAD:** AND, YOUR HONOR, IT'S THE DEFENSE
19 POSITION NOW, AS IT WAS IN 2007, THAT THE APPROPRIATE
20 SENTENCE -- AND I WOULD SAY IRRESPECTIVE OF THE COURT'S
21 GUIDELINES CALCULATIONS, ALTHOUGH I HAVE A SOMEWHAT
22 DIFFERENT VIEW -- IS THE TEN-YEAR SENTENCE.

23 **THE COURT:** THAT'S THE SENTENCE THAT WAS
24 PREVIOUSLY IMPOSED. RIGHT?

25 **MR. DYBWAD:** THAT IS THE SENTENCE THAT WAS

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1 PREVIOUSLY IMPOSED.

2 IN SOME SENSES, NOTHING HAS CHANGED SINCE 2007, IN
3 THE SENSE THAT OBVIOUSLY ONE COURT REVIEWED ALL OF THE
4 EVIDENCE IN FRONT OF IT, BOTH THE GUIDELINES AS WELL AS THE
5 3553(A) FACTORS, AND CAME TO THE CONCLUSION THAT A TEN-YEAR
6 SENTENCE WAS APPROPRIATE. NOTHING, I THINK, IN MATERIAL
7 RESPECTS AS TO THAT HAS CHANGED.

8 ON THE FLIP SIDE, THERE HAS BEEN CHANGE, AND
9 THAT'S BEEN CHANGE BY MR. PROWLER DURING THE THREE YEARS IN
10 BETWEEN THE LAST SENTENCING AND THIS SENTENCING THAT I
11 BELIEVE THE COURT CAN AND SHOULD TAKE ACCOUNT OF.

12 THE COURT IS IN POSSESSION OF NUMEROUS OFTENTIMES
13 ENTITLED "SUPPLEMENTAL INFORMATION RE SENTENCING" THAT
14 DESCRIBE FIRST THAT MR. PROWLER HAS BEEN A MODEL PRISONER
15 WHILE AT F.C.I. SEAGOVILLE, AND THE COURT HAS A PROGRESS
16 REPORT -- A FAIRLY RECENT PROGRESS REPORT FROM F.C.I.
17 SEAGOVILLE IN THE RECORD BEFORE IT THAT DESCRIBES
18 MR. PROWLER MAKING PRODUCTIVE USE OF HIS TIME, NOT GETTING
19 IN TROUBLE, SETTING UP A FITNESS BOOKS LIBRARY.

20 AND I THINK THAT THAT IS SIGNIFICANT BECAUSE IT
21 SHOWS THAT MR. PROWLER IS RESPONDING WELL TO THE
22 REHABILITATION ASPECT OF THE INCARCERATION AT F.C.I.
23 SEAGOVILLE AND THAT LENDS SUPPORT TO THE INITIAL, ORIGINAL
24 SENTENCE OF TEN YEARS WAS THE SENTENCE THAT WAS CAPABLE OF
25 ACHIEVING ALL OF THE AIMS OF PUNISHMENT, INCLUDING THE AIM

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1 OF REHABILITATION. AND WE CAN, THEN, NOW KNOW THAT THAT IS
2 TRUE BECAUSE OF THE PROGRESS AT SEAGOVILLE.

3 THERE IS ALSO IN FRONT OF THE COURT A NUMBER OF
4 CERTIFICATES OF COMPLETION FROM THE ALEPH INSTITUTE,
5 A-L-E-P-H.

6 AND THAT SHOWS MR. PROWLER BEING -- AND I'M SURE
7 THAT HE MAY DESCRIBE IT TO THE COURT -- IN CLOSER CONNECTION
8 OR RECONNECTING TO HIS RELIGIOUS ROOTS, AND THAT IS
9 SOMETHING THAT HAS BEEN IMPORTANT TO HIM OVER THE LAST THREE
10 YEARS. AND HE HAS ACHIEVED A NUMBER OF CERTIFICATES OF
11 COMPLETION IN DIFFERENT TORAH STUDY CLASSES AND PRAYER
12 CLASSES, AND THE COURT HAS ALL THAT INFORMATION IN FRONT OF
13 IT.

14 AND I THINK THAT, IN SOME RESPECTS, NOTHING HAS
15 CHANGED. THE TEN-YEAR SENTENCE IS STILL APPROPRIATE. AND A
16 LOT HAS CHANGED IN TERMS OF INFORMATION AVAILABLE TO THE
17 COURT THAT SHOWS THAT A TEN-YEAR SENTENCE CAN AND WILL
18 ACHIEVE THE AIMS OF 3553(A) THAT THE COURT NEEDS TO TAKE
19 INTO ACCOUNT.

20 WHERE JUDGE TAKASUGI STARTED AND ENDED AND WHERE I
21 PICK UP NOW IS THE OVERARCHING INSTRUCTION OF 3553(A) IS TO
22 IMPOSE THE MINIMALLY SUFFICIENT SENTENCE TO ACHIEVE THE AIMS
23 OF PUNISHMENT.

24 AND THAT'S WHY I WAS DISCUSSING THAT THE
25 REHABILITATION AT SEAGOVILLE APPEARS TO BE WORKING WELL, AND

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1 THAT IS A SPECIALLY DESIGNATED FACILITY FOR THESE TYPES OF
2 OFFENSES TO ACHIEVE THOSE REHABILITATIVE AIMS.

3 IN TERMS OF DETERRENT EFFECT AND PUNISHMENT
4 EFFECT, I'LL TALK BRIEFLY. IN THE SOUTHERN DISTRICT OF
5 NEW YORK, I BELIEVE TWO OR THREE WEEKS AGO, THERE WAS A
6 RESENTENCING OF LYNNE STEWART, THE LAWYER WHO HAD BEEN
7 CONVICTED OF, IN SOME SENSE, PASSING ON TERRORIST MESSAGES.

8 AND AT THE ORIGINAL SENTENCING, JUDGE KOELTL HAD,
9 I BELIEVE, IMPOSED A 27- OR 28-MONTH SENTENCE. AND SHE HAD
10 STEPPED OUT OF THE COURTROOM AND SAID SHE COULD DO THE TIME
11 STANDING ON HER HEAD.

12 WHEN SHE CAME BACK FOR RESENTENCING, JUDGE KOELTL
13 EXPLICITLY TOOK INTO ACCOUNT FOR HER POST ORIGINAL
14 SENTENCING COMMENTS AND SAYING BASED ON YOUR COMMENTS, THAT
15 ORIGINAL SENTENCE WAS INSUFFICIENT TO ACHIEVE THE AIM OF
16 3553(A); SPECIFICALLY, IT OBVIOUSLY DID NOT PROVIDE ADEQUATE
17 PUNISHMENT OR DETERRENCE.

18 HERE WE'RE IN A SOMEWHAT DIFFERENT SITUATION WHERE
19 THE GOVERNMENT DID ISSUE A PRESS RELEASE AT THE TIME OF
20 MR. PROWLER'S ORIGINAL SENTENCING.

21 THAT PRESS RELEASE, WHICH IS ATTACHED AS EXHIBIT
22 "A," INDICATES THAT AT SOME LEVEL THE GOVERNMENT OR THE
23 I.C.E. AGENT QUOTED VIEWED A TEN-YEAR SENTENCE AS SUFFICIENT
24 FOR THE PURPOSES OF DETERRENCE BECAUSE, IN THAT PRESS
25 RELEASE, THEY SAY THIS SENTENCE SENDS A STRONG MESSAGE AND

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1 WORDS TO THE EFFECT OF "LET THIS SENTENCE BE A LESSON."

2 AND I DON'T WANT TO HARP ON IT, BUT I THINK IT'S
3 IMPORTANT TO POINT OUT THAT, EVEN AS TO OTHER 3553(A)
4 FACTORS, WHEN YOU TALK ABOUT DETERRENCE OR WHAT SENDS A
5 STRONG MESSAGE, EVEN THAT TEN-YEAR SENTENCE IMPOSED
6 ORIGINALLY BY JUDGE TAKASUGI DID SEND A DETERRENCE MESSAGE,
7 AND IT ALSO WAS APPROPRIATE FOR REHABILITATIVE AIMS.

8 YOUR HONOR, THE ORIGINAL SENTENCING TALKED
9 ABOUT -- AND I'LL TALK TO THIS COURT ABOUT THAT MR. PROWLER
10 WILL NEVER BE RESTORED TO FULL LIBERTY IN THE SENSE THAT
11 ANYONE IN THIS ROOM HAS.

12 WE ARE TALKING ABOUT VARIOUS FORMS OF CONFINEMENT
13 OR RESTRICTION GOING FORWARD FOR THE REST OF HIS LIFE. AND
14 IMPOSING A TEN-YEAR SENTENCE, THAT WAS A SENTENCE THAT BOTH
15 ACHIEVED PUNISHMENT AND REHABILITATION BUT LEFT OPEN SOME
16 POSSIBILITY THAT, WITH CONTINUED PROGRESS ON THE
17 REHABILITATION, THAT THERE COULD BE A REENTRY TO SOCIETY AT
18 SOME POINT UNDER EXTREMELY RESTRICTED CONDITIONS.

19 HE'S NOW 61 YEARS OLD. WE'RE TALKING ABOUT A
20 SENTENCE TO CRAFT TO GIVE HIM THAT GIVES HIM SOME LIGHT AT
21 THE END OF THE TUNNEL SO THAT HE CAN BE RESTORED TO SOME, I
22 GUESS, SLIGHTLY LESS DEGREE OF CONFINEMENT, NEVER FULL
23 LIBERTY. AND CERTAINLY THAT'S NOT WHAT JUDGE TAKASUGI
24 IMPOSED WITH LIFETIME SUPERVISION AND A NUMBER OF EXTREMELY
25 RESTRICTIVE CONDITIONS.

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1 I'M NOT STANDING IN FRONT OF THE COURT SAYING THAT
2 LIFETIME SUPERVISION IS INAPPROPRIATE, AND I'M NOT STANDING
3 IN FRONT OF THE COURT SAYING THAT IN WHOLE PART THESE
4 CONDITIONS OF SUPERVISED RELEASE ARE INAPPROPRIATE.

5 I'M SAYING THAT WE'RE TALKING ABOUT VARIOUS
6 DEGREES OF CONFINEMENT BUT CRAFTING A SENTENCE THAT ALLOWS
7 SOME LIGHT AT THE END OF THE TUNNEL FOR REENTRY INTO SOCIETY
8 WITH MAXIMUM MONITORING.

9 **THE COURT:** JUST A COUPLE OF QUESTIONS.

10 UNDER THE 3553(A) FACTORS, ONE OF THE FACTORS TO
11 BE CONSIDERED IS TO PROVIDE THE DEFENDANT WITH NEEDED
12 EDUCATION OR VOCATIONAL TRAINING, MEDICAL CARE, OR OTHER
13 CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER.

14 WOULD YOU SAY THAT THAT APPLIES HERE? ARE THERE
15 SOME SPECIFIC NEEDS OF THE DEFENDANT AS DESCRIBED THERE THAT
16 THE COURT SHOULD BE CONSIDERING IN IMPOSING A SENTENCE? IF
17 SO, WHAT SENTENCE DO THEY DICTATE?

18 **MR. DYBWAD:** AND, YOUR HONOR, IN MY ATTEMPT TO
19 ANSWER THIS QUESTION, I THINK IT MAY BOIL DOWN TO MORE, WHEN
20 THE COURT PRONOUNCES SENTENCE, I'M GOING TO ASK THE COURT TO
21 AT LEAST MAKE A STRONG RECOMMENDATION TO THE BUREAU OF
22 PRISONS THAT MR. PROWLER BE RETURNED TO F.C.I. SEAGOVILLE
23 WHERE HE HAS BEEN FOR THESE LAST THREE YEARS.

24 THAT IS A FACILITY THAT HAS WHAT IS DESCRIBED AS
25 AN S.O.M.P. PROGRAM, SEXUAL OFFENDER MANAGEMENT PROGRAM. IT

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1 IS ONE OF THE FEW BUREAU OF PRISONS FACILITIES IN THE
2 COUNTRY THAT HAS THAT CAPABILITY. IN FACT, I BELIEVE IT'S
3 ONE OF TWO OR THREE.

4 **THE COURT:** BUTNER BEING ONE OF THEM. THE FIRST
5 PROGRAM I THINK WAS THERE.

6 **MR. DYBWAD:** AND I BELIEVE F.C.I. DEVENS BEING
7 ANOTHER.

8 BUT SEAGOVILLE IS A FACILITY THAT HAS THE SEXUAL
9 OFFENDER MANAGEMENT PROGRAM.

10 **THE COURT:** NOW, HAS HE BEEN IN THAT PROGRAM, OR
11 HAS HE NOT BEEN ELIGIBLE BECAUSE HE HADN'T BEEN SENTENCED
12 YET?

13 **MR. DYBWAD:** HE HAS NOT BEEN IN THE PROGRAM. IT'S
14 MY UNDERSTANDING FROM HIM THAT HE HAS NOT YET BEEN DEEMED
15 ELIGIBLE, BUT IT OFTEN HAPPENS NEAR THE END OF YOUR SENTENCE
16 THAT YOU BECOME ENROLLED IN IT.

17 I LOOKED AT THE PROGRESS REPORT LAST NIGHT. IT
18 HAS ESSENTIALLY AN ACTION PLAN GOING FORWARD. CLEARLY, THE
19 ACTION PLAN FOR HIM CONTEMPLATES ENROLLING HIM IN THAT
20 PROGRAM IN THE FUTURE. I DON'T KNOW HOW THE DATES WORKED
21 OUT IN TERMS OF HOW IMMEDIATE IT IS, BUT IT CERTAINLY IS
22 CONTEMPLATED IN THE DOCUMENTS IN FRONT OF THE COURT THAT HE
23 WOULD BE ENROLLED IN THAT PROGRAM.

24 **THE COURT:** AND ARE THERE ANY SPECIFIC
25 REQUIREMENTS FOR THE PROGRAM, LIKE THE SENTENCE MUST BE AT

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1 LEAST SOME PERIOD OF TIME?

2 **MR. DYBWAD:** NO, YOUR HONOR.

3 IN CONNECTION WITH ANOTHER CASE, I DID SOME
4 INVESTIGATION SPECIFICALLY WITH THE SEXUAL OFFENDER
5 MANAGEMENT PROGRAM AT F.C.I. DEVENS. THAT PROGRAM, AS I
6 PRESUME SEAGOVILLE, HAS NO MINIMUM OR MAXIMUM TIME THAT
7 SOMEONE WHO IS HOUSED THERE WOULD NEED TO HAVE AS A LENGTH
8 OF SENTENCE TO PARTICIPATE IN THE PROGRAM.

9 MY MEMORY, ALTHOUGH I HOPE THE COURT DOESN'T HOLD
10 ME TO IT, IS PERHAPS THE MINIMUM AMOUNT OF TIME IN THE
11 PROGRAM IS SIX OR TWELVE MONTHS, BUT IT CAN LAST AS LONG AS
12 SOMEONE IS INCARCERATED AT THAT FACILITY.

13 **THE COURT:** AND A COUPLE OF OTHER QUESTIONS.

14 YOU MADE REFERENCE TO PROGRESS REPORTS FROM THE
15 BUREAU OF PRISONS THAT WOULD HELP THE COURT UNDERSTAND THE
16 ADJUSTMENT THAT HE'S MADE SINCE HE'S BEEN IN PRISON.

17 AND THOSE CERTIFICATES OF COMPLETION, I KNOW I
18 HAVE REVIEWED THOSE. BUT COULD YOU IDENTIFY FOR ME AGAIN
19 WHERE THEY ARE SO I CAN JUST LOOK AT THEM AGAIN.

20 **MR. DYBWAD:** YES, YOUR HONOR. I'M LOOKING AT A
21 DOCUMENT THAT I ENTITLED "SUPPLEMENTAL INFORMATION RE
22 RESENTENCING." I PUT IT UNDER SEAL. I HAVE A LODGE DATE ON
23 IT OF APRIL 13, 2010, AND EXHIBIT "A" TO THAT SUPPLEMENTAL
24 INFORMATION WAS THE PROGRESS REPORT FROM SEAGOVILLE.

25 **THE COURT:** ALL RIGHT. AND SOME OF THE

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1 CERTIFICATES, AT LEAST ONE, IS ATTACHED TO THE MOST RECENT
2 FILING THAT WAS FILED YESTERDAY. SO THOSE MAY BE IN VARIOUS
3 PLACES.

4 **MR. DYBWAD:** THEY ARE SPRINKLED THROUGHOUT THE
5 DIFFERENT SUPPLEMENTAL FILINGS IN FRONT OF THE COURT.

6 **THE COURT:** OKAY. AND THIS MAY BE NOT SOMETHING
7 THAT YOU CAN COMMENT UPON, AND I WILL ASK THE GOVERNMENT TO
8 COMMENT ON IT AS WELL.

9 ONE OF THE FACTORS THAT THE COURT IS SUPPOSED TO
10 CONSIDER, THE NEED TO AVOID UNWARRANTED SENTENCE DISPARITIES
11 AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN FOUND
12 GUILTY OF SIMILAR CONDUCT.

13 I DON'T KNOW IF YOU HAVE BEEN INVOLVED WITH ENOUGH
14 OF THESE CASES TO EVEN ADDRESS THAT WHOLE QUESTION OF
15 DISPARITY AS IT RELATES TO WHAT PROBATION IS RECOMMENDING
16 THAT THE SENTENCE BE, AND I THINK THE GOVERNMENT JOINS.

17 **MR. DYBWAD:** YOUR HONOR, THE ORIGINAL SENTENCING I
18 REFERENCE -- AND, UNFORTUNATELY, I HAVE NOT REVIEWED IT IN A
19 WHILE -- THE NINTH CIRCUIT OPINION IN UNITED STATES VERSUS,
20 I BELIEVE, IT'S MICHAEL CLARK. OBVIOUSLY, IT'S A PUBLISHED
21 OPINION DEALING WITH THE CONSTITUTIONALITY OF THIS STATUTE.

22 THE REASON I BRING IT UP TO THIS COURT IS MY
23 RECOLLECTION WAS, IN COMBING THROUGH SOME OF THE DISTRICT
24 COURT DOCUMENTS, IN THE MICHAEL CLARK CASE -- AND I BELIEVE
25 THE SENTENCE IMPOSED IN THAT CASE WAS 97 MONTHS. BUT,

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1 AGAIN, AT THIS POINT I'M SORT OF GUESSING.

2 I BELIEVE IN COMBING THROUGH THE DISTRICT COURT
3 DOCUMENTS, I'VE LEARNED THAT MICHAEL CLARK'S CASE, WHICH WAS
4 ALSO A TRAVEL ABROAD/MINORS CASE -- IN FACT, PROBABLY ONE OF
5 THE FIRST ONES -- INVOLVED A NUMBER OF VICTIMS. HE MAY HAVE
6 PLED GUILTY TO AN 11(C)(1)(C) THAT PERHAPS SPECIFIED A
7 CERTAIN NUMBER; BUT MY MEMORY OF THE RECORD IN FRONT OF THE
8 DISTRICT COURT WAS THAT THERE WAS THE PRESENCE OF MULTIPLE
9 VICTIMS WITH A 97-MONTH SENTENCE IMPOSED.

10 HERE, EVEN A 120-MONTH SENTENCE, A TEN-YEAR
11 SENTENCE, IS ABOVE THAT NUMBER IN TERMS OF COMPARABLE CASES.

12 AGAIN, THESE CASES ARE TO SOME DEGREE RELATIVELY
13 NEW. SO IT'S TOUGH TO IDENTIFY COMPARABLE STATISTICS.

14 **THE COURT:** AND THE CONSTITUTIONALITY STATUTE THAT
15 YOU'RE REFERENCING IS THE STATUTE THAT'S IN ISSUE HERE WHERE
16 ONE LEAVES THE UNITED STATES WITH THE INTENT OF COMMITTING
17 THE CRIME THAT'S DESCRIBED IN THIS INDICTMENT. SO IT WAS A
18 CHALLENGE TO THE CONSTITUTIONALITY OF THAT STATUTE.

19 **MR. DYBWAD:** NOW, AS MY MEMORY COMES BACK,
20 PRECISELY 2423(C), WHICH IS ONE OF THE STATUTES HERE,
21 ELIMINATED THE INTENT REQUIREMENT THAT WAS THE SUBJECT OF
22 THE CONSTITUTIONAL CHALLENGE IN UNITED STATES V. CLARK, THE
23 ELIMINATION OF THE INTENT REQUIREMENT.

24 **THE COURT:** AND I WAS CURIOUS EARLIER, AND I
25 HAVEN'T DONE THIS RESEARCH. SO CIRCUIT COURTS HAVE ACTUALLY

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1 COMMENTED ON THE CONSTITUTIONALITY OF THE STATUTE.

2 **MR. DYBWAD:** THE NINTH CIRCUIT HAS, AGAIN, BACK IN
3 2007 WHEN I LOOKED -- THE NINTH CIRCUIT IN UNITED STATES V.
4 CLARK UPHELD THE CONSTITUTIONALITY, I BELIEVE, AS TO A
5 CHALLENGE REGARDING THE ELIMINATION OF THE INTENT
6 REQUIREMENT.

7 THERE WAS A SUBSEQUENT CASE THAT MAY HAVE TURNED
8 MORE ON STATUTORY INTERPRETATION WHICH ACTUALLY STRUCK DOWN
9 A CONVICTION. BUT OFF THE TOP OF MY HEAD, I CAN'T -- IT MAY
10 HAVE HAD TO DO WITH THE STATUTORY DEFINITION OF PERHAPS THE
11 WORD "TRAVELING" OR SOMETHING ALONG THOSE LINES.

12 **THE COURT:** THANK YOU.

13 **MR. DYBWAD:** AT THE TIME THIS CASE WAS ORIGINALLY
14 IN FRONT OF THE DISTRICT COURT, THE NINTH CIRCUIT HAD BEEN
15 THE ONLY CIRCUIT TO WEIGH IN ON THE CONSTITUTIONALITY OF THE
16 STATUTE, AND I'M NOT SURE IF THAT'S TRUE TODAY.

17 **THE COURT:** AND THE NINTH CIRCUIT, AT LEAST AT
18 THAT TIME, HAD FOUND THE STATUTE TO BE CONSTITUTIONAL?

19 **MR. DYBWAD:** YES.

20 **THE COURT:** ALL RIGHT. THANK YOU.

21 GOVERNMENT'S COUNSEL MAY ADDRESS ALL OF THE
22 FACTORS THAT ONE MUST CONSIDER IN DECIDING THE APPROPRIATE
23 SENTENCE. THAT COULD INCLUDE DEPARTURES AND WHAT YOU
24 BELIEVE THE SENTENCE SHOULD BE. I'D ALSO LIKE FOR YOU TO
25 ADDRESS THE FACTOR ABOUT DISPARITY AMONG DEFENDANTS IF YOU

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1 HAVE BEEN INVOLVED IN ENOUGH OF THESE CASES TO EVEN COMMENT
2 ON THAT.

3 **MS. PEACE GARNETT:** IF THE COURT WILL ALLOW ME TO
4 GO BACK TO THE MULTIPLE COUNT ADJUSTMENT.

5 **THE COURT:** AND I HAD A NOTE, AND I WAS JUST
6 REMINDING MYSELF THAT I WAS GOING TO ASK EACH COUNSEL AS TO
7 WHETHER YOU FOUND ANY NEW CASES ON DOUBLE COUNTING THAT YOU
8 FELT THE COURT SHOULD REVIEW FOR PURPOSES OF ADDRESSING THE
9 POSITIONS THAT YOU'VE RAISED.

10 **MS. PEACE GARNETT:** YOUR HONOR, I DID DURING THE
11 BREAK LOOK FOR CASES THAT WERE MORE RECENT THAN THE CASE
12 THAT I CITED, AND THOSE CASES DEALT WITH THINGS LIKE DOUBLE
13 COUNTING WITH RESPECT TO CRIMINAL HISTORY AND THAT SORT OF
14 THING.

15 SO GOVERNMENT'S POSITION IS THE MOST RELEVANT CASE
16 FOR THIS ISSUE IS THE STOTERAU CASE THAT I CITED EARLIER.

17 AND I JUST WANTED TO ADD A DEFINITION OF DOUBLE
18 COUNTING. FIRST, IT WAS THE DEFINITION I GAVE BEFORE
19 (AS READ:)

20 "IMPERMISSIBLE DOUBLE COUNTING OCCURS WHEN ONE PART OF
21 THE GUIDELINES IS APPLIED TO INCREASE DEFENDANT'S
22 PUNISHMENT ON ACCOUNT" --

23 **THE COURT:** THE COURT REPORTER IS ASKING YOU TO
24 SLOW DOWN JUST A LITTLE BIT.

25 **MS. PEACE GARNETT:** SORRY. (AS READ:)

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1 "IMPERMISSIBLE DOUBLE COUNTING OCCURS WHEN ONE PART OF
2 THE GUIDELINES IS APPLIED TO INCREASE A DEFENDANT'S
3 PUNISHMENT ON ACCOUNT OF ANOTHER" -- "ON ACCOUNT OF A
4 KIND OF HARM THAT HAS ALREADY BEEN TAKEN INTO ACCOUNT
5 IN ANOTHER PART OF THE GUIDELINES."

6 THE COURT WENT ON TO STATE (AS READ:)

7 "HOWEVER, DOUBLE COUNTING IS NOT ALWAYS IMPERMISSIBLE.
8 IT IS SOMETIMES AUTHORIZED AND INTENDED BY THE
9 SENTENCING GUIDELINES WHEN EACH INDICATION OF THE
10 BEHAVIOR SERVES A UNIQUE PURPOSE UNDER THE GUIDELINES."

11 (END OF QUOTED MATERIAL.)

12 **MS. PEACE GARNETT:** WHAT I WANT TO ADDRESS IS SOME
13 OF THE ARGUMENTS THAT THE DEFENDANT MADE.

14 THERE WAS AN ENHANCEMENT FOR USE OF A MINOR THAT
15 WAS APPLIED. THAT ONLY APPLIES TO JOHN DOE A. HE IS THE
16 ONLY ONE THAT THE GOVERNMENT IS ARGUING, WITH RESPECT TO THE
17 CHARGED OFFENSES, WAS USED BY PROWLER TO BRING ANOTHER MINOR
18 IN -- TO BRING ANOTHER MINOR TO PROWLER TO BE SEXUALLY
19 EXPLOITED.

20 THEN THERE IS THE ISSUE OF THE MULTIPLE COUNT
21 ADJUSTMENT.

22 IT IS OUR ARGUMENT THAT THAT ADJUSTMENT IS UNIQUE
23 TO THE MINORS IN THIS CASE. UNDER THE APPLICABLE
24 GUIDELINES, 2G1.3, THE PURPOSE OF THAT MULTIPLE COUNT
25 ADJUSTMENT WITH RESPECT TO CHILD EXPLOITATION CASES IS TO

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1 TAKE INTO ACCOUNT THE HARM THAT WAS IMPOSED ON EACH MINOR
2 VICTIM, EVEN IF THE MINOR VICTIM IS CHARGED WITH ANOTHER
3 MINOR IN THE SAME COUNT.

4 THAT IS THE PURPOSE OF THE MULTIPLE COUNT
5 ADJUSTMENT FOR CHILD EXPLOITATION.

6 AND THEN WITH RESPECT TO THE PATTERN AND PRACTICE
7 ENHANCEMENT, THAT IS TO TAKE INTO ACCOUNT DEFENDANT'S
8 REPEATED BEHAVIOR OVER TIME, WHETHER HE WAS ENGAGED IN THIS
9 TWO OR MORE TIMES.

10 AND WHAT THE GOVERNMENT IS SAYING IS IT IS NOT
11 IMPERMISSIBLE DOUBLE COUNTING IN THIS CASE BECAUSE DEFENDANT
12 USED A MINOR, WHICH WAS COVERED BY THE GUIDELINES; DEFENDANT
13 ENGAGED IN SEXUALLY EXPLICIT CONDUCT WITH MORE THAN ONE
14 MINOR, MULTIPLE MINORS, THE SIX WE HAVE IDENTIFIED; AND THAT
15 IS TAKEN INTO ACCOUNT BY THE MULTIPLE COUNT ADJUSTMENT.

16 AND IN ADDITION TO THAT CONDUCT, HE MOLESTED SOME
17 OF THE SAME MINORS MORE THAN ONCE, AND HE MOLESTED
18 ADDITIONAL MINORS IN THE SAME PERIOD OF TIME.

19 AND SO EACH ONE OF THOSE ENHANCEMENTS GOES TO A
20 UNIQUE HARM THAT DEFENDANT ENGAGED IN IN THIS CASE.

21 AND SO IT IS NOT IMPERMISSIBLE DOUBLE COUNTING
22 UNDER STOTERAU TO TAKE EACH ONE OF THOSE THINGS INTO
23 ACCOUNT.

24 AND SO IT'S OUR POSITION THAT, AS TO CALCULATING
25 THE PROPER GUIDELINES, THE COURT SHOULD IMPOSE THE

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1 ENHANCEMENT FOR PATTERN AND PRACTICE AS WELL AS USE THE
2 MULTIPLE COUNT ADJUSTMENT AND THAT BOTH ARE APPROPRIATE
3 UNDER NINTH CIRCUIT CASE LAW.

4 WITH RESPECT TO VULNERABLE VICTIM, THE ONLY THING
5 I WOULD SAY ABOUT VULNERABLE VICTIM IS IT'S A CLOSE CASE.

6 BUT ONE OF THE THINGS THAT I WANTED TO ARGUE WAS
7 THAT IN THIS CASE -- THIS CASE -- THIS GOVERNMENT COUNSEL
8 HAS DONE CHILD EXPLOITATION CASES FOR A COUPLE OF YEARS.
9 THIS CASE IS VERY UNIQUE, GIVEN THE AMOUNT OF CHILDREN THAT
10 WERE EXPLOITED OVER TIME.

11 TYPICALLY, WE DON'T KNOW HOW MANY CHILDREN HAVE
12 BEEN EXPLOITED BY INDIVIDUALS WHO LEAVE OUR COUNTRY AND GO
13 TO THIRD WORLD COUNTRIES AND EXPLOIT MINORS.

14 BUT IN THIS CASE, DEFENDANT DOCUMENTED OVER FIVE
15 YEARS ALL OF HIS ACTIVITY IN LEDGERS, INDEX CARDS, AND IN
16 HIS HANDWRITTEN JOURNAL.

17 AND THE QUANTITY OF HIS SEXUAL EXPLOITATION IS
18 EXTRAORDINARY. I PERSONALLY HAVE NOT SEEN ANYTHING LIKE IT.

19 I'VE TALKED TO MY COLLEAGUES WHEN I WAS IN VIOLENT
20 AND ORGANIZED CRIME. NOW I'M IN NATIONAL SECURITY. BUT
21 WHEN I WAS VIOLENT/ORGANIZED CRIME, I TALKED TO MY
22 COLLEAGUES. THEY HAVEN'T SEEN ANYTHING LIKE IT.

23 SO WITH RESPECT TO JUST PUNISHMENT FOR THIS
24 OFFENSE AND THE FACTORS THAT ARE TAKEN INTO ACCOUNT UNDER
25 3553(A), IT IS THE GOVERNMENT'S POSITION THAT THIS CASE

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1 WARRANTS A LENGTHY PERIOD OF INCARCERATION, NOT JUST FOR
2 DETERRENCE BUT ALSO FOR PUNISHMENT BECAUSE OF THE
3 EXTRAORDINARY NATURE OF DEFENDANT'S CONDUCT.

4 AS TO THE GUIDELINES THEMSELVES -- AND I'M SORRY
5 I'M JUMPING AROUND. BUT AS TO THE GUIDELINES THEMSELVES,
6 EVEN IF THE COURT DOESN'T BELIEVE THAT A CERTAIN GUIDELINE
7 IS APPROPRIATE, THE COURT CAN STILL DEPART UPWARD.

8 SECTION 2G1.3, APPLICATION NOTE 7, PROVIDES FOR AN
9 UPWARD DEPARTURE WHEN YOU ARE DEALING WITH MORE THAN TEN
10 VICTIMS. AND IN THIS CASE, WE KNOW IT IS COMPLETELY
11 UNDISPUTED WE'RE DEALING WITH HUNDREDS OF VICTIMS HERE.
12 DEFENDANT HAS NEVER DISPUTED THAT.

13 IN FACT, HE TOLD AUTHORITIES ON THE DAY OF HIS
14 ARREST THAT HE WOULD MOLEST MAYBE FIVE TO SEVEN CHILDREN A
15 MONTH. AND IN HIS LEDGERS THERE ARE A NUMBER OF NAMES, AND
16 HE EVEN KEPT INDEX CARDS THAT THE P.S.R. REFERS TO WHERE, BY
17 YEAR, HE WOULD TALK ABOUT THE NEW BOYS THAT HE EXPLOITED
18 EACH YEAR. SOMETIMES IT WAS 33 BOYS, NEW BOYS, EACH YEAR.
19 AND HE WOULD GIVE THE AVERAGE AGE, 33 BOYS, AVERAGE AGE
20 14.9. THIS WENT ON FOR FIVE YEARS.

21 SO BOTH 2G1.3 PROVIDES FOR AN UPWARD DEPARTURE,
22 AND 5K2.0 ALSO PROVIDES FOR AN UPWARD DEPARTURE IF THE
23 OFFENSE INVOLVES -- EXCUSE ME -- IF CIRCUMSTANCES ARE SO
24 UNUSUAL THAT SUCH A DEPARTURE WOULD BE WARRANTED.

25 WE'RE TALKING ABOUT A TEN-VICTIM DEPARTURE FROM

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1 2G1.3, AND HERE WE'RE DEALING WITH MAYBE 20 TIMES THE NUMBER
2 OF VICTIMS.

3 SO IF THE COURT IS NOT INCLINED TO IMPOSE OR FIND
4 ONE OF THE GUIDELINES ARE APPLICABLE, WE'D ASK THAT THE
5 COURT UPWARDLY DEPART.

6 PROBATION IS ASKING FOR A 30-YEAR SENTENCE IN THIS
7 CASE. WE HAVE ASKED FOR 327 YEARS, WHICH WAS AT THE TIME
8 THE HIGH END OF THE GUIDELINES.

9 **THE COURT:** YEARS?

10 **MS. PEACE GARNETT:** MONTHS. WHICH IS ABOUT 27.5.

11 AND IT'S OUR POSITION, IT'S ALWAYS BEEN OUR
12 POSITION THAT SHOULD BE THE MINIMUM.

13 DEFENDANT IS ESSENTIALLY A PREDATOR, AND WE'VE
14 SHOWN OVER FIVE YEARS THAT THAT IS WHAT HE WAS ENGAGING IN
15 WHEN HE WAS IN THAILAND. AND HE ADMITTED AT HIS CHANGE OF
16 PLEA THAT THE REASON HE WENT TO THAILAND WAS SO THAT HE
17 COULD EXPLOIT MINORS.

18 NOW, DEFENSE HAS TALKED ABOUT THIS PRESS RELEASE
19 THAT WAS ISSUED AFTER THE ORIGINAL SENTENCING.

20 IT HAS NEVER BEEN OUR POSITION THAT TEN YEARS WAS
21 SUFFICIENT. IT IS NOT OUR JOB TO CRITICIZE A JUDGE IN THE
22 PRESS, AND WE WOULD NEVER DO SO. WE HAVE MAINTAINED ALL
23 ALONG THAT A MINIMUM OF 327 MONTHS WAS APPROPRIATE.

24 SO TO JUST POINT TO A PRESS RELEASE AND SAY THAT
25 THAT IS SUFFICIENT BECAUSE WE ISSUED A PRESS RELEASE OR THAT

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1 I ISSUED A PRESS RELEASE IS ABSURD.

2 NOT ONLY DID DEFENDANT SEXUALLY EXPLOIT THE MINORS
3 IN THIS CASE, BUT HE TOOK PHOTOGRAPHS OF THE MINORS, AND
4 THEY HAVE BEEN ATTACHED AS EXHIBITS TO THE DECLARATION OF
5 GARY KIERNAN.

6 AGAIN, IT'S JUST AN EXCERPT OF THE HUNDREDS OF
7 PHOTOGRAPHS THAT HE TOOK.

8 APART FROM JUST TAKING PHOTOGRAPHS, HE KEPT
9 MOMENTOS. HE HAD THE MINORS -- A LOT OF THE MINORS CLIPPED
10 THEIR PUBIC HAIR, WHICH HE KEPT AS A MOMENTO.

11 HE WOULD USE THE PHOTOGRAPHS THAT HE TOOK, AND HE
12 WOULD SHOW THEM TO OTHER MINORS, PRESUMABLY TO MAKE THEM
13 MORE COMFORTABLE ABOUT WHAT HE WAS GOING TO ASK THEM TO DO.

14 BUT NOT ONLY DID HE USE THE PHOTOGRAPHS IN THAT
15 MANNER, HE ALSO DOCUMENTED THE FACT THAT HE MET UP WITH
16 ANOTHER CHILD PREDATOR AND SHARED THE PHOTOGRAPHS WITH HIM.
17 THEY BARTERED THEIR PHOTOGRAPHS.

18 HE ALLOWED ANOTHER PREDATOR TO UPLOAD THE
19 PHOTOGRAPHS THAT DEFENDANT HAD TAKEN, AND THESE ARE ALL
20 X-RATED PHOTOGRAPHS. AGAIN, AN EXCERPT IS IN THE
21 DECLARATION THAT WE SUBMITTED UNDER SEAL.

22 APART FROM THAT CONDUCT, PROBABLY ONE OF THE WORST
23 THINGS THE DEFENDANT DID IS, AS HIS VICTIMS GOT OLDER, HE
24 WOULD TURN THEM INTO CHILD EXPLOITERS THEMSELVES. HE WOULD
25 PAY SOME OF THEM A BONUS TO FIND A YOUNGER MINOR TO BRING TO

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1 HIM IN ORDER TO EXPLOIT. HE DIDN'T JUST DO THIS WITH JACK
2 OR JOHN DOE A, HE DID THIS WITH AT LEAST TWO OTHER MINORS.

3 UNDER THE AMENDED DECLARATION THAT WE FILED UNDER
4 EXHIBIT "F," PAGE 30, THERE IS A JOURNAL ENTRY DATED
5 OCTOBER 27, 2004 -- AGAIN, IN THE SAME TIME PERIOD AS
6 COUNT 10 -- WHERE HE TALKS ABOUT PAYING ANOTHER KID NAMED
7 DTON, SPELLED D-T-O-N, A BONUS.

8 HE SAYS (AS READ:)

9 "AS FOR MONEY, I FELT I HAD TO BE GENEROUS. I GAVE
10 DTON HIS USUAL 200 BAHT," WHICH IS A MEASLY \$5, "THEN I
11 GAVE 100 BAHT TO DTON AS A BONUS FOR BRINGING HIS
12 WONDERFUL FRIEND, AND I SPELLED OUT FOR THEM HOW I NOW
13 WANT BOYS 12 TO 14 TO JOIN HIM."

14 IN ANOTHER JOURNAL ENTRY DATED 11/17/2004, AGAIN
15 THE SAME TIME PERIOD AS COUNT 10, THE DEFENDANT WROTE ABOUT
16 DTON BRINGING A 13-YEAR-OLD BOY, WHO FROM THE JOURNAL ENTRY,
17 APPEARED TO HAVE BEEN A VIRGIN, AND DEFENDANT TALKS ABOUT
18 HAVING ORAL AND ANAL SEX WITH THIS 13 YEAR OLD.

19 AND THEN HE SAYS (AS READ:)

20 "I PAID 200 BAHT EACH, PLUS A BONUS OF 100 BAHT TO DTON
21 THAT I EXPLICITLY SAID WAS FOR BRINGING A BOY OF 13,"
22 PARENTHETICAL, "TO REALLY REINFORCE THE INCENTIVE."

23 THIS IS THE CONDUCT THAT THE DEFENDANT ENGAGED IN
24 OVER FIVE YEARS. AND THIS IS WHY THE GOVERNMENT IS ASKING
25 FOR A MINIMUM SENTENCE OF 327 MONTHS.

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1 THE DEFENDANT'S ACTS WERE DESPICABLE, AND THEY
2 EXTENDED OVER A PERIOD OF TIME, AND THERE IS EVERY
3 INDICATION THAT HE WOULD HAVE CONTINUED IN THOSE ACTS IF HE
4 HAD NOT BEEN CAUGHT RED-HANDED BY THE ROYAL THAI POLICE.

5 THE DEFENDANT TALKS ABOUT THE FACT THAT HE HAS
6 IMPROVED DURING THE TIME PERIOD THAT HE HAS BEEN IN JAIL,
7 BUT THAT'S BECAUSE HE'S AWAY FROM MINORS.

8 IN HIS PRIOR SENTENCING HEARING, HE ARGUED THAT HE
9 WOULD BE SUBJECT TO HARSH TREATMENT IN PRISON, BUT WE HEAR
10 NOW THAT HE'S WRITING POETRY AND HE'S DOING BOOK REVIEWS AND
11 HE HAS, YOU KNOW, ALL OF THESE FAVORABLE THINGS HAPPENING IN
12 HIS LIFE.

13 IN MANY RESPECTS, HE IS BETTER OFF THAN THE
14 VICTIMS THAT HE EXPLOITED. HE GETS THREE MEALS A DAY. WHEN
15 HE FOUND THESE VICTIMS, THEY WERE EMACIATED AND HUNGRY. HE
16 GETS TO SLEEP IN A BED. HIS VICTIMS SLEPT IN THE STREETS.
17 THEY SLEPT IN ROACH-INFESTED QUARTERS.

18 THE DEFENDANT GETS LEISURE TIME, DOES THE BOOK
19 REVIEWS, AND ALL OF THESE OTHER THINGS, WHEREAS HE LEFT HIS
20 VICTIMS WITHOUT ANY HOPE.

21 HE COULD HAVE TAUGHT THEM ENGLISH. SOME OF HIS
22 VICTIMS SAID THAT THEY WANTED TO LEARN ENGLISH AND THEY
23 WISHED THAT HE HAD TAUGHT THEM ENGLISH AND GAVE THEM FOOD
24 INSTEAD OF SEXUALLY EXPLOITING THEM.

25 IT'S THE GOVERNMENT'S POSITION THAT A MINIMUM

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1 SENTENCE OF 327 MONTHS IS REASONABLE, NOT JUST FOR
2 DETERRENCE, NOT JUST TO PROTECT THESE CHILDREN, BUT FOR
3 PUNISHMENT. THAT IS ONE OF THE THINGS THAT THE COURT MUST
4 TAKE INTO ACCOUNT. AND, AGAIN, THE DEFENDANT'S ACTS WERE
5 EXTRAORDINARY.

6 AS TO UNWANTED SENTENCING DISPARITY, THE PROBATION
7 OFFICER TALKED ABOUT THE HIRSCH CASE AND THE JULIAN CASE IN
8 HIS RECOMMENDATION.

9 IN THE HIRSCH CASE, THE DEFENDANT WAS SENTENCED TO
10 105 YEARS FOR 20 YEARS OF HISTORY OF EXPLOITING SEVERAL
11 MINORS. HE KEPT THEM OVER AN EXTENDED PERIOD OF TIME. IT
12 WAS NOT THE NUMBER OF MINORS THAT ARE INVOLVED IN THIS CASE.
13 IT WAS FAR FEWER.

14 IN THE JULIAN CASE, THE DEFENDANT WAS SENTENCED TO
15 25 YEARS BUT, AGAIN, LESS VICTIMS.

16 PROBABLY THE MOST ANALOGOUS CASE THAT I FOUND IS
17 THE FRANK CASE, AND THAT WAS DECIDED MARCH 15, 2010. IT IS
18 2010 WESTLAW 890451 OUT OF THE 11TH CIRCUIT, AND IT INVOLVED
19 AN INDIVIDUAL WHO WAS CHARGED WITH 2423(B) AND 2423(C), AS
20 WELL AS ENTICEMENT. BUT THE COURT MADE CLEAR WHAT THE
21 SENTENCE IT IMPOSED WENT TO. SO I'LL TALK ABOUT THAT IN A
22 SECOND.

23 AS FAR AS HIS CONDUCT, HE ENGAGED IN SEXUALLY
24 EXPLICIT CONDUCT WITH THREE MINOR GIRLS AGE 12 TO 15. HE
25 TOOK THEIR PHOTOGRAPHS. HE PAID THE GIRLS FOR SEX

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1 APPROXIMATELY \$15 TO \$25. AND HE WAS SENTENCED JUST FOR THE
2 2423(B) AND (C) COUNTS TO 30 YEARS FOR TRAVELING, WHICH IS
3 IN ACCORDANCE WITH WHAT THE PROBATION OFFICER, AGAIN, IS
4 REQUESTING AND IS ACTUALLY MORE THAN WHAT THE GOVERNMENT IS
5 REQUESTING IN THIS CASE.

6 SO, AGAIN, THE GOVERNMENT BELIEVES THAT THE
7 RECOMMENDED SENTENCE IS WARRANTED BASED ON ALL OF THE
8 FACTORS SET FORTH IN 3553(A), AND WE WOULD ASK THE COURT TO
9 IMPOSE A SENTENCE OF A MINIMUM OF 327 MONTHS.

10 **THE COURT:** JUST A QUESTION OF GOVERNMENT'S
11 COUNSEL.

12 I MADE REFERENCE TO THE VICTIM IMPACT STATEMENT.

13 **MS. PEACE GARNETT:** YES.

14 **THE COURT:** AND I DON'T REMEMBER THE DATE OF THE
15 DOCUMENT OFFHAND, BUT IS THERE ANYTHING ELSE THAT'S BEEN
16 DONE TO GIVE NOTICE TO THE VICTIMS AND TO ADVISE THEM THAT
17 THEY HAVE A RIGHT TO BE PRESENT AT THE HEARING, OR IS THE
18 STATEMENT THAT'S CONTAINED IN THAT DOCUMENT, WHAT HAS BEEN
19 DONE, THAT THE GOVERNMENT BELIEVES SATISFIES THE
20 REQUIREMENTS OF LAW?

21 **MS. PEACE GARNETT:** WELL, THE GOVERNMENT
22 BELIEVES -- THE GOVERNMENT WISHES WE COULD HAVE DONE MORE.
23 BUT THE PROBLEM WITH THIS CASE IS BECAUSE THE VICTIMS WERE
24 HOMELESS, THE WAY THAT THE AGENTS FOUND THE VICTIMS TO BEGIN
25 WITH FOR THIS CASE IS THEY LITERALLY WALKED THE STREETS OF

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1 THAILAND FOR WEEKS ON END WITH PHOTOGRAPHS THAT WERE FOUND
2 IN THE DEFENDANT'S POSSESSION. AND THEY TRIED TO MATCH
3 PHOTOGRAPHS WITH THE MINORS ON THE STREET; AND IN SOME
4 CASES, THEY WERE SUCCESSFUL, AND IN SOME CASES THEY WERE
5 NOT.

6 OVER THE COURSE OF THIS CASE, WE WOULD FIND
7 VICTIMS, WE WOULD LOSE VICTIMS. THEY WOULD BE ARRESTED,
8 THEY WOULD BE ON GLUE. IT WAS PROBABLY ONE OF THE MOST
9 TROUBLING ASPECTS OF THIS CASE.

10 WHEN THE CASE WAS CLOSE TO SENTENCING, WE TRIED TO
11 FIND THEM AGAIN. AND, AGAIN, THE AGENTS IN BANGKOK WALKED
12 THE STREETS LOOKING FOR THE VICTIMS. AND WE WERE ABLE TO
13 SUBMIT THE VICTIM IMPACT STATEMENTS OF THE VICTIMS THAT WE
14 FOUND, BUT THERE WERE OTHER VICTIMS THAT WE HAVE NOT FOUND
15 AND MAY NEVER FIND.

16 SO WE TRIED TO DO MORE, BUT THIS IS WHAT WE WERE
17 ABLE TO DO AT THIS POINT IN THE CASE.

18 **THE COURT:** THE FILING OF THE VICTIM IMPACT
19 STATEMENT IS APRIL 19, 2010, AND I WOULD JUST ASK TWO
20 QUESTIONS.

21 ONE, THE VICTIMS THAT YOU WERE ABLE TO CONTACT
22 WERE TOLD THAT THEY HAD A RIGHT TO BE PRESENT AT THE
23 HEARING?

24 **MS. PEACE GARNETT:** ABSOLUTELY.

25 **THE COURT:** AND AT THE TIME, YOU TOLD THEM WHAT

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1 THE SENTENCING DATE WAS?

2 MS. PEACE GARNETT: YES. WE TOLD THEM THOSE
3 THINGS.

4 AND ORIGINALLY, WHEN WE THOUGHT THIS CASE WAS
5 GOING TO TRIAL, WE SECURED VISAS FOR SOME OF THE VICTIMS
6 THAT WE WERE ABLE TO FIND. WE WOULD HAVE GONE THROUGH THAT
7 PROCESS AGAIN IF THEY HAD INDICATED THEY WANTED TO BE HERE.
8 BUT, UNFORTUNATELY, A LOT OF THE VICTIMS HAD JUST -- I MEAN,
9 THEY -- SOME OF THEM DIDN'T EVEN THINK THEY WERE VICTIMS
10 BECAUSE THEY WERE JUST SO BEATEN DOWN AT THIS POINT, BUT
11 THEY GAVE US THE STATEMENTS, AND THEN THEY SORT OF MOVED ON.

12 THE COURT: AND NO FURTHER NOTIFICATION WAS
13 ATTEMPTED OR GIVEN AS THE SENTENCING DATES CHANGED IN THIS
14 CASE?

15 MS. PEACE GARNETT: NO, YOUR HONOR.

16 THE COURT: AND NONE OF THE VICTIMS ARE PRESENT AT
17 THE HEARING TODAY?

18 MS. PEACE GARNETT: NONE OF THE VICTIMS ARE
19 PRESENT. NONE INDICATED THEY WANTED TO BE.

20 THE COURT: ALL RIGHT. THANK YOU.

21 DEFENSE COUNSEL WISH TO BE HEARD FURTHER?

22 I'M ACTUALLY GOING TO HEAR FROM THE DEFENDANT
23 SOON, BUT DEFENSE COUNSEL MAY WANT TO COMMENT ON SOME OF THE
24 STATEMENTS MADE BY GOVERNMENT'S COUNSEL.

25 AND THE DEFENDANT'S AGE?

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1 **MR. DYBWAD:** IT'S 61, YOUR HONOR.

2 **THE COURT:** COUNSEL MAY BE HEARD.

3 **MR. DYBWAD:** I JUST HAD THREE BRIEF POINTS TO MAKE
4 TO THE COURT.

5 THIS CASE OBVIOUSLY HAS ESSENTIALLY INTERNATIONAL
6 IMPLICATIONS. AND IN CONNECTION WITH THE ORIGINAL
7 SENTENCING, POINTED OUT, THIS IS ACTUALLY A CASE BY SOMEONE
8 WHO WAS LIVING AS A LAWFUL PERMANENT RESIDENT IN THAILAND,
9 WHO COMMITTED OFFENSES AGAINST THAI CITIZENS, WHO WAS
10 INVESTIGATED BY THE ROYAL THAI POLICE, AND THEN SUBSEQUENTLY
11 PROSECUTED BY THE THAI PROSECUTORS AND THEN SPENT A YEAR IN
12 A THAI PRISON.

13 AND, YES, IN CONNECTION WITH THE ORIGINAL
14 SENTENCE, IT WAS DISCUSSED THAT THE CONDITIONS IN THE THAI
15 PRISON WERE DEPLORABLE, AND IT'S A RELIEF THAT THE
16 CONDITIONS IN THE U.S. PRISONS ARE BETTER.

17 I DON'T MEAN TO SUGGEST THAT ADDITIONAL PUNISHMENT
18 OBVIOUSLY WASN'T WARRANTED. WE ARE TALKING ABOUT AN
19 AMERICAN CITIZEN. ADDITIONAL PUNISHMENT OVER AND ABOVE WHAT
20 THE THAI SOVEREIGN IMPOSED IS WHAT'S GOING TO HAPPEN HERE.

21 BUT IN CRAFTING ANY SENTENCE -- AT THE LAST
22 SENTENCING, THE FACT THAT MR. PROWLER HAD, IN FACT, BEEN
23 PROSECUTED AND PUNISHED IN THAILAND FOR THESE ACTS, I
24 BELIEVE, ARGUABLY WAS NOT FACTORED INTO THE EVENTUAL
25 SENTENCE, AND THAT WAS A YEAR IN ROUGH CONDITIONS.

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1 SECOND, THE PRESS RELEASE, VERY BRIEFLY. THERE IS
2 A DIFFERENCE BETWEEN NOT CRITICIZING A JUDGE AND ISSUING A
3 PRESS RELEASE TRUMPETING WHAT THAT JUDGE DID.

4 HERE THERE WAS A PRESS RELEASE. I POINT IT OUT
5 NOT BECAUSE -- I'M NOT UNDER THE ILLUSION THE GOVERNMENT
6 WANTS A SENTENCE OTHER THAN 327 MONTHS, BUT ONE AIM OF
7 3553(A) IS TO CRAFT A SENTENCE THAT HAS A DETERRENT EFFECT.

8 THE PRESS RELEASE IS EVIDENCE FROM THE PARTY
9 OPPONENT THAT, AT ONE POINT, SOMEONE VIEWED THAT TEN-YEAR
10 SENTENCE AS HAVING A DETERRENT EFFECT. THAT'S WHY I MENTION
11 IT.

12 YOUR HONOR, IN THIS CASE I MAY AGREE WITH THE
13 GOVERNMENT SOMEWHAT, BUT I WANT TO POINT OUT TO THE COURT
14 THERE IS NO PLAN FOR VICTIM RESTITUTION IN THIS CASE.

15 THE COURT, NO DOUBT, REVIEWED THE VICTIM IMPACT
16 STATEMENT. THE REASON WHY PRESUMABLY THERE HAS BEEN NO
17 REQUEST FOR RESTITUTION IS WHEN THE FOUR VICTIMS WERE
18 INTERVIEWED RECENTLY, EACH ONE SAID THAT THEY HAD NOT BEEN
19 MEDICALLY HARMED, PSYCHOLOGICALLY HARMED, AND HAD SUFFERED
20 NO ILL EFFECTS AS A RESULT OF THIS CONDUCT.

21 I MERELY MEAN TO POINT OUT THIS WOULD BE A VERY
22 DIFFERENT CASE IF THERE HAD BEEN VIOLENCE, FORCE, AND
23 LONG-LASTING IMPACT ON THE VICTIMS.

24 YOUR HONOR, IN SHORT, IN THE END, IT'S THE COURT
25 OBVIOUSLY WHO DECIDES; AND WE REALLY ARE TALKING ABOUT

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1 SOMEONE WHO IS 61 YEARS OLD. IS THERE A SENTENCE THAT CAN
2 BE CRAFTED THAT GIVES SOME MODICUM OF FREEDOM AT SOME POINT
3 IN THE FUTURE, AND I BELIEVE THAT A TEN-YEAR SENTENCE WAS
4 APPROPRIATE THE FIRST TIME AND CONTINUE TO BELIEVE THAT A
5 TEN-YEAR SENTENCE ACHIEVES THOSE AIMS THREE YEARS LATER.

6 **THE COURT:** JUST A QUESTION.

7 DOUBLE COUNTING, ANY ADDITIONAL CASES OTHER THAN
8 THOSE THAT ARE CITED IN THE PAPERS THAT ARE BEFORE THE COURT
9 THAT YOU BELIEVE THE COURT SHOULD CONSIDER?

10 **MR. DYBWAD:** NO, YOUR HONOR.

11 PERHAPS IT'S MYOPIA. THE GOVERNMENT'S FOCUSING ON
12 DOUBLE COUNTING. I WOULD, OF COURSE, TRY AND RETURN TO THE
13 VULNERABLE VICTIM. I HAVE A DIFFERENT VIEW ON WHETHER
14 THAT'S PROPER, BUT I'VE LAID OUT MY ARGUMENTS TO THE COURT.

15 **THE COURT:** OKAY. THANK YOU.

16 I'M, AT THIS POINT, PREPARED TO HEAR FROM THE
17 DEFENDANT IF THE DEFENDANT WISHES TO ADDRESS THE COURT.

18 HE DOES HAVE A RIGHT TO ADDRESS THE COURT, AND THE
19 COURT'S READY TO HEAR FROM HIM.

20 I ACKNOWLEDGED THIS MORNING THAT I HAVE READ THE
21 LETTER THAT HE WROTE TO THE COURT. THAT LETTER, OF COURSE,
22 WAS DATED IN ANTICIPATION OF THE SENTENCING BEING AT AN
23 EARLIER DATE; SO THERE MAY BE ADDITIONAL INFORMATION THAT HE
24 MAY WANT TO PROVIDE TO THE COURT.

25 SO, SIR, IF YOU WISH TO ADDRESS THE COURT, IF

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1 YOU'LL JUST COME TO THE LECTERN, PLEASE.

2 BEFORE THE DEFENDANT'S STATEMENT, I JUST WANT THE
3 RECORD TO REFLECT, SIR, YOU DID RECEIVE A COPY OF THE
4 PRESENTENCE REPORT AND YOU REVIEWED THAT PRESENTENCE REPORT?

5 **THE DEFENDANT:** YES, YOUR HONOR.

6 **THE COURT:** AND COUNSEL WAS PRESENT AT THE TIME
7 THAT YOU REVIEWED IT?

8 **THE DEFENDANT:** YES.

9 **THE COURT:** AND IF COUNSEL WASN'T THERE, DO YOU
10 BELIEVE THAT YOU'VE HAD THE OPPORTUNITY TO ASK QUESTIONS OF
11 COUNSEL ABOUT ANYTHING THAT WAS CONTAINED IN THE REPORT THAT
12 YOU MIGHT NOT HAVE UNDERSTOOD?

13 **THE DEFENDANT:** YES, YOUR HONOR.

14 **THE COURT:** YOU'RE AWARE THAT BOTH COUNSEL FILED
15 POSITION PAPERS, WRITTEN POSITIONS, THAT THEY'VE ADDRESSED
16 HERE TODAY; AND HAVE YOU DISCUSSED WITH YOUR COUNSEL THE
17 POSITION THAT HE PROVIDED TO THE COURT IN WRITING AS TO HOW
18 THE COURT SHOULD CALCULATE THE GUIDELINES AND THE
19 APPROPRIATE SENTENCE?

20 SO IT'S YOUR COUNSEL'S POSITION PAPER. ARE YOU
21 AWARE OF THE POSITION THAT HE HAS TAKEN, PLACED IN WRITING
22 BEFORE THE COURT AS TO THE APPROPRIATE SENTENCE?

23 **THE DEFENDANT:** YES, YOUR HONOR.

24 **THE COURT:** YOU ALSO KNOW THAT YOUR COUNSEL RAISED
25 OBJECTIONS TO SOME OF THE CONDITIONS THAT WERE RECOMMENDED

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1 AS CONDITIONS OF SUPERVISED RELEASE, AND WE'VE DISCUSSED
2 THOSE HERE IN OPEN COURT. YOU'RE AWARE OF THAT. CORRECT?

3 **THE DEFENDANT:** YES, YOUR HONOR.

4 **THE COURT:** THE VICTIM IMPACT STATEMENT. I DON'T
5 KNOW IF YOU'VE SEEN IT OR COUNSEL DISCUSSED IT WITH YOU, BUT
6 I RAISED THE QUESTION WITH THE GOVERNMENT BECAUSE THE LAW
7 DOES REQUIRE THAT VICTIMS BE TOLD THAT THEY HAVE A RIGHT TO
8 ADDRESS THE COURT. THEY CAN DO IT IN WRITING, THEY CAN BE
9 PRESENT IN THE COURT, THEY CAN BE HEARD ORALLY.

10 SO YOU'VE HEARD THE GOVERNMENT'S RESPONSE. IN
11 THIS CASE, THERE ARE SOME VICTIM STATEMENTS BEFORE THE COURT
12 THAT THE COURT HAS REVIEWED. YOU'RE AWARE OF THAT?

13 **THE DEFENDANT:** YES, I READ THEM WITH COUNSEL THIS
14 MORNING.

15 **THE COURT:** ALL RIGHT.

16 SO, SIR, WHATEVER YOU WISH TO PLACE ON THE RECORD
17 AT THIS TIME THAT YOU BELIEVE THE COURT SHOULD CONSIDER FOR
18 PURPOSES OF SENTENCE, PLEASE, GO FORWARD.

19 **THE DEFENDANT:** WELL, YOUR HONOR, SINCE MY INITIAL
20 SENTENCING, THERE IS NOT A DAY THAT HAS GONE BY THAT I HAVE
21 NOT BEEN INVOLVED IN THE DEEPEST SOUL-SEARCHING OF NOT JUST
22 WHAT I HAD DONE OVERSEAS, BUT MY ENTIRE LIFE AND THE EVENTS
23 THAT LED UP TO THIS.

24 AND I SPOKE AT MY INITIAL SENTENCING ABOUT THE
25 GUILT THAT I HAVE FELT AND EXPERIENCED TOWARD MY VICTIMS.

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1 AND SHORTLY AFTER THAT, I FELT A LITTLE STRANGE ABOUT IT.
2 AND I REALIZED MORE AND MORE OVER TIME THAT GUILT IS NOT
3 WHAT -- IT'S NOT A GOOD ENOUGH WORD TO DESCRIBE WHAT I FELT.

4 IN MY CASE, SHAME IS REALLY THE WORD. AND IT'S
5 MULTIPLIED A THOUSAND-FOLD BECAUSE TO ME GUILT IS WHAT A
6 PERSON FEELS WHEN -- IT'S SOMETHING THEY KNOW THEY'VE DONE
7 WRONG, AND IT COULD BE IN THEIR OWN PRIVATE ROOM.

8 SHAME IS WHAT YOU FEEL, A GUILT FEELING THAT'S SO
9 MAGNIFIED BECAUSE YOU KNOW THAT EVERYBODY IN YOUR UNIVERSE,
10 PAST AND PRESENT, BECOMES AWARE OF SOMETHING YOU'VE DONE
11 THAT'S SHAMEFUL.

12 AND IN MY CASE, YES, IT WAS TERRIBLY WRONG,
13 SHAMEFUL AND DISHONORABLE. AND REALIZING, KNOWING FIRSTHAND
14 THAT THERE ARE PEOPLE FROM FOUR DECADES AGO WHO WERE ABLE TO
15 FIND OUT WHAT I HAD DONE, AND THEY WERE SHATTERED BY IT,
16 THESE WERE ALL THE PEOPLE WHO I WOULD JUST LIKE TO REACH OUT
17 TO AND SAY I'M SORRY.

18 I OWE WHATEVER I CAN OWE TO MY DIRECT VICTIMS IN
19 THAILAND BUT ALSO TO ALL THE PEOPLE -- MY FAMILY, MY
20 RELATIVES, MY EX-WIFE, EX-GIRLFRIEND -- THE SHAME I FEEL
21 TOWARD THIS. SO THERE SHOULD BE NO DOUBT ABOUT WHAT I FEEL
22 AND WHAT THIS HAS DONE, NOT JUST TO OTHER PEOPLE, BUT TO
23 MYSELF.

24 AND, UNFORTUNATELY, I CANNOT FEEL ANOTHER PERSON'S
25 PAIN. I CAN ONLY WISH THAT I COULD DO SOMETHING TO SAY I'M

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1 SORRY TO EVERYBODY AND TO PRAY THAT THEIR WOUNDS HAVE HEALED
2 OR WILL HEAL.

3 AND PLEASE BEAR WITH ME NOW.

4 WHAT I BELIEVE WITHOUT ANY DOUBT IS THAT,
5 SOMEWHERE ALONG THE LINE, I DECIDED MY RELIGIOUS FAITH WAS
6 NOT WORTH KEEPING, WHICH WAS IRRELEVANT IN MY LIFE.

7 WELL, THE THREE YEARS I HAVE BEEN INCARCERATED, I
8 HAVE BEEN INVOLVED IN A VERY INTENSIVE RETURN. THE WORD IS
9 IN HEBREW. IT'S TESHUVAH, WHICH MEANS REPENTANCE, A RETURN
10 TO MY RELIGIOUS FAITH.

11 AND WITH THIS, IT HAS ENABLED ME TO REFLECT UPON
12 HOW MUCH I'VE DEVIATED FROM THE RELIGIOUS VALUES OF MY FAITH
13 AND WHAT GOD EXPECTS OF ME AND HOW MUCH I HAVE TO WORK ON
14 THIS TO RETURN, AND I FEEL I HAVE ACCOMPLISHED A LOT WITH
15 THAT SO FAR.

16 AND I SEE HOW, THROUGH THAT, GRAVE MY WRONGDOING
17 WAS BECAUSE IT DIDN'T JUST BRING ME DOWN IN THE EYES OF GOD
18 BUT DRAGGED OTHER PEOPLE DOWN, TOO.

19 SO IN CONCLUSION, I JUST WANT TO SAY I PRAY THAT
20 YOU WILL CONSIDER -- IN JUDGING ME, CONSIDER NOT JUST THE
21 WORST THING THAT I'VE EVER DONE, THE MOST DISHONORABLE THING
22 THAT I'VE EVER DONE, I PRAY THAT YOU WILL JUDGE ME ON WHAT I
23 CAN BE, TO RETURN TO MY FAITH, TO GOD, DEVOTE MYSELF
24 ENTIRELY IN THIS WAY, AND AT MY AGE NOW, MY FAMILY.

25 I WANT NOTHING MORE THAN TO BE ABLE TO HAVE THE

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1 TIME TO DEMONSTRATE TO EVERYBODY MY ABILITIES, WHAT I CAN
2 OFFER IN SO MANY WAYS, AND TO PROVE TO MY FELLOW CITIZENS
3 AND THE WORLD THAT I CAN BE WHATEVER I AM SUPPOSED TO BE,
4 WHATEVER I WANT TO BE, AND HOPEFULLY TRY TO MAKE THE WORLD A
5 BETTER PLACE.

6 THANK YOU.

7 **THE COURT:** THANK YOU, SIR. YOU MAY BE SEATED.

8 I'M GOING TO TAKE A RECESS JUST TO CALCULATE THE
9 SENTENCE. BUT BEFORE I DO THAT, I'LL JUST ASK THE PARTIES
10 IS THERE ANYTHING ELSE THAT EITHER SIDE WISHES TO PLACE ON
11 THE RECORD BEFORE I TAKE THE BREAK?

12 DEFENSE HAVE ANYTHING FURTHER?

13 **MR. DYBWAD:** NO, YOUR HONOR.

14 **THE COURT:** GOVERNMENT HAVE ANYTHING FURTHER?

15 **MS. PEACE GARNETT:** YOUR HONOR, I DIDN'T WANT TO
16 LEAVE THE COURT WITH THE IMPRESSION THAT THE VICTIMS DIDN'T
17 FEEL LIKE VICTIMS. SOME OF THE VICTIMS, AS YOU WILL SEE
18 FROM THE VICTIM IMPACT STATEMENTS, SAID THAT THEY WERE
19 EMBARRASSED AND ONE OF THEM SAID THAT HE'S MORE PROMISCUOUS
20 NOW.

21 THE VICTIMS HAVE SUSTAINED A LOT OF DAMAGE HERE.
22 THEY JUST AREN'T -- THEY JUST DON'T KNOW TO WHAT EXTENT THEY
23 HAVE BEEN DAMAGED.

24 SO I JUST WANTED TO MAKE SURE THAT THE COURT WAS
25 CLEAR ON THAT, AND WITH THAT, I'LL SUBMIT.

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1 **THE COURT:** ALL RIGHT. WE'LL TAKE A RECESS NOW.
2 SO IT WILL BE ABOUT 15 MINUTES.

3 (*RECESS TAKEN.*)

4 **THE COURT:** WE CAN GO BACK ON THE RECORD FOR
5 SENTENCING.

6 SO IF THE DEFENDANT AND DEFENSE COUNSEL WILL JUST
7 STAND AT THE LECTERN, PLEASE.

8 (*MR. DYBWAD AND DEFENDANT APPROACH LECTERN.*)

9 **THE COURT:** NO LEGAL CAUSE WHY SENTENCE SHOULD NOT
10 BE IMPOSED?

11 **MR. DYBWAD:** NO, YOUR HONOR.

12 **THE COURT:** AND DEFENDANT DOES WAIVE FORMAL
13 ARRAIGNMENT FOR HIS SENTENCE?

14 **MR. DYBWAD:** YES, YOUR HONOR.

15 **THE COURT:** THE COURT, HAVING CONSIDERED AND I
16 HAVE ALREADY INCORPORATED INTO THE RECORD OR MADE A PART OF
17 THE RECORD ALL OF THE THINGS THAT I'VE REVIEWED FOR PURPOSES
18 OF THE SENTENCING HEARING, THE COURT, HAVING CONSIDERED ALL
19 OF THOSE DOCUMENTS -- INCLUDING THE PRESENTENCE REPORT, THE
20 POSITION PAPERS OF THE PARTIES, VARIOUS POSITION PAPERS,
21 JUST BECAUSE OF THE LENGTH OF TIME THAT IT'S TAKEN TO GET TO
22 THIS POINT TO IMPOSE THE SENTENCE AFTER THE REMAND OF THE
23 CIRCUIT, THE CASE LAW THAT'S BEEN RELIED UPON BY THE
24 PARTIES, THE STATEMENT OF THE DEFENDANT, HIS LETTER THAT HE
25 WROTE TO THE COURT AND ALSO THE ORAL STATEMENT MADE TO THE

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1 COURT, THE LETTERS THAT I'VE RECEIVED FROM HIS PARENTS.

2 THE COURT ALSO CONSIDERS THE ADJUSTMENT THAT HE'S
3 MADE SINCE HE'S BEEN IN THE BUREAU OF PRISONS, THE VARIOUS
4 PROGRAMS THAT HE'S PARTICIPATED IN, THE CERTIFICATES THAT
5 HAVE BEEN GIVEN AS A RESULT OF HIS SATISFACTORILY COMPLETING
6 CERTAIN PROGRAMS AND PARTICIPATING IN CERTAIN PROGRAMS THAT
7 WERE OFFERED BY THE BUREAU -- HAVING CONSIDERED ALL OF THOSE
8 THINGS, THE COURT IS NOW READY TO IMPOSE THE SENTENCE.

9 SO, FIRST, I'LL START WITH THE CALCULATION OF THE
10 GUIDELINES.

11 THE COURT HAS THE BENEFIT OF THE GUIDELINES AS
12 CALCULATED BY PROBATION, AS CALCULATED BY GOVERNMENT
13 COUNSEL, AS CALCULATED BY THE DEFENSE; THE PARTIES HAVING
14 ADDRESSED SOME OF THE ISSUES ON WHICH YOU DISAGREED AS TO
15 HOW THE GUIDELINES SHOULD BE CALCULATED, THE COURT WILL NOW
16 INDICATE THE COURT'S CALCULATION OF THE GUIDELINES.

17 SO THE BASE OFFENSE LEVEL IS 24; THE COMMERCIAL
18 SEX ACT, THE TWO-POINT INCREASE; THE USE OF THE MINOR,
19 TWO-POINT INCREASE.

20 THE COURT WILL NOT INCREASE FOR VULNERABLE
21 VICTIMS. SO I DO NOT ACCEPT PROBATION'S CALCULATION AS TO
22 THAT, THE FOUR POINTS. SO I WILL NOT ADD THOSE ADDITIONAL
23 FOUR POINTS INTO THE CALCULATION OF THE GUIDELINES.

24 THE MULTIPLE COUNT ADJUSTMENT, THE COURT DOES
25 INCREASE FOUR LEVELS FOR THE MULTIPLE COUNT ADJUSTMENT, AS

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1 WELL AS FIVE LEVELS FOR THE PATTERN OF ACTIVITY.

2 SO BOTH MULTIPLE COUNT ADJUSTMENT AND THE PATTERN
3 OF ACTIVITY, AND THE COURT WOULD FIND THAT THAT DOES NOT
4 RESULT IN DOUBLE COUNTING.

5 THREE POINTS CREDIT FOR ACCEPTANCE OF
6 RESPONSIBILITY.

7 SO THE TOTAL OFFENSE LEVEL IS 34 WITH A CRIMINAL
8 HISTORY CATEGORY OF 1. SO THE GUIDELINE RANGE, AS
9 CALCULATED BY THE COURT, IS 151 TO 188 MONTHS.

10 THE COURT IN THIS CASE CONSIDERS THE FACTORS AS
11 THE COURT IS REQUIRED TO DO FOR IMPOSING THE SENTENCE -- THE
12 FACTORS THAT HAVE BEEN DISCUSSED ON THE RECORD, BUT ALSO ARE
13 DISCUSSED IN THE LETTER PREPARED BY PROBATION IN THEIR
14 JUSTIFICATION PORTION OF THEIR LETTER PURSUANT TO 18
15 UNITED STATES CODE 3553(A).

16 AND IN CONSIDERING THESE FACTORS AND WHAT THE
17 SENTENCE SHOULD BE, THE COURT CONSIDERS, OF COURSE, THE
18 NATURE AND CIRCUMSTANCES OF THE OFFENSE, HISTORY AND
19 CHARACTERISTICS OF THE DEFENDANT, THE NEED FOR THE SENTENCE
20 IMPOSED IN THIS CASE.

21 THE SENTENCE THAT THE COURT WILL IMPOSE WILL
22 REFLECT THE SERIOUSNESS OF THE OFFENSE.

23 THE COURT HAS CONSIDERED THAT ONE PURPOSE FOR
24 SENTENCING IS TO PROMOTE RESPECT FOR THE LAW, TO PROVIDE
25 JUST PUNISHMENT FOR THE OFFENSE, TO AFFORD ADEQUATE

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1 DETERRENCE TO CRIMINAL CONDUCT, TO PROTECT THE PUBLIC FROM
2 FURTHER CRIMES OF THE DEFENDANT, AND THEN TO PROVIDE THE
3 DEFENDANT WITH NEEDED EDUCATIONAL, VOCATIONAL TRAINING OR
4 OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER.

5 AND FOR THAT ONE, THE COURT IS CONSIDERING THE
6 PROGRAM THAT'S OFFERED BY THE BUREAU OF PRISONS OF WHICH THE
7 DEFENDANT IS APPARENTLY AWARE, AND IT IS OFFERED AT THE
8 FACILITY WHERE THE DEFENDANT HAS BEEN APPARENTLY FOR THE
9 LAST THREE YEARS.

10 IT IS A PROGRAM THAT'S DESIGNED TO HELP THOSE WHO
11 HAVE COMMITTED SIMILAR OFFENSES AND TO PROVIDE JUST
12 TREATMENT.

13 THE COURT HAS ALSO CONSIDERED THE KINDS OF
14 SENTENCES THAT ARE AVAILABLE. THAT WOULD INCLUDE A SENTENCE
15 WITHIN THE RANGE OF THE GUIDELINES. THE GUIDELINES ARE
16 ADVISORY. THE COURT UNDERSTANDS THAT. THEY'RE NOT
17 MANDATORY, BUT THE COURT MUST CALCULATE THEM, AND SO THAT'S
18 THE STARTING PLACE, AND SO I HAVE DONE SO.

19 BUT CERTAINLY THE SENTENCES THAT ARE AVAILABLE TO
20 THIS COURT WOULD BE A SENTENCE WITHIN THE GUIDELINE RANGE,
21 SENTENCES BELOW THE RANGE, SENTENCES UPWARD FROM THE RANGE,
22 ALL THE WAY TO THE STATUTORY MAXIMUM SENTENCE THAT COULD BE
23 IMPOSED IN THIS CASE.

24 SO ALL OF THOSE ARE AVAILABLE TO THE COURT. THIS
25 IS NOT A CASE THAT HAS A MANDATORY MINIMUM SENTENCE; AND SO,

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1 THEREFORE, THE COURT CAN SENTENCE WHATEVER THE COURT THINKS
2 IS APPROPRIATE.

3 THE GUIDELINE SENTENCING RANGE, OF COURSE, I'VE
4 CONSIDERED THAT BECAUSE I CALCULATED THE GUIDELINES AND I'VE
5 IDENTIFIED WHAT I BELIEVE THAT RANGE TO BE, THE PERTINENT
6 POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION.

7 AND SO ON THE RECORD TODAY WE'VE DISCUSSED SOME OF
8 THE GUIDELINES, STATEMENTS, WHETHER THEY APPLY, WHY THEY
9 APPLY, HOW DOES THE COURT CALCULATE THE SENTENCE CONSIDERING
10 THOSE; I HAVE NOT READ THE LEGISLATIVE HISTORY THAT WAS
11 ACTUALLY DISCUSSED BY COUNSEL IN THE CASE, BUT I HAVE NOT
12 ACTUALLY REVIEWED THAT; THE NEED TO AVOID UNWARRANTED
13 SENTENCE DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS
14 WHO HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT.

15 AND COUNSEL HAVE EACH, ON THE RECORD, ADDRESSED
16 OTHER CASES WHERE SENTENCES HAVE BEEN IMPOSED FOR SIMILAR
17 CONDUCT; AND TO THE EXTENT THAT THE CIRCUIT HAS BECOME
18 INVOLVED IN COMMENTING ON WHETHER THAT WAS AN APPROPRIATE
19 SENTENCE OR NOT, SO WE HAVE SOME CASE LAW TO GIVE SOME
20 GUIDANCE.

21 IN THIS CASE, WE DON'T HAVE OTHER DEFENDANTS. WE
22 JUST HAVE ONE DEFENDANT. SO IT IS NOT A CASE WHERE THE
23 COURT HAS LOOKED AT ROLE OF THE OFFENSE AND CRIMINAL HISTORY
24 AND COMPARED WITH INDIVIDUAL DEFENDANTS THE KINDS OF THINGS
25 THAT THE COURT WOULD COMPARE IF THERE WAS MORE THAN ONE

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1 DEFENDANT INVOLVED.

2 THIS IS NOT A RESTITUTION CASE. THERE'S BEEN NO
3 REQUEST FOR RESTITUTION OR ANY SUGGESTION THAT RESTITUTION
4 SHOULD BE IMPOSED. SO THAT IS NOT A FACTOR TO BE
5 CONSIDERED.

6 THE COURT FINDS THAT THE SENTENCE -- AND I BELIEVE
7 IT TO BE A REASONABLE SENTENCE, CONSIDERING ALL OF THE
8 FACTORS THAT THE COURT HAS JUST DISCUSSED -- IS THE SENTENCE
9 OF 25 YEARS. IT IS 300 MONTHS, AND THAT IS THE SENTENCE
10 THAT THE COURT WILL IMPOSE.

11 I DO CONSIDER THAT TO BE A HIGH SENTENCE. IT MAY
12 BE ONE OF THE LARGER SENTENCES THAT I HAVE HAD THE OCCASION
13 TO IMPOSE, EXCEPT IN THOSE INSTANCES WHERE THERE WERE
14 MANDATORY MINIMUMS THAT THE COURT FELT THAT IT MUST IMPOSE
15 BECAUSE CONGRESS HAD ADDRESSED IT.

16 IN THIS CASE, I THINK IT'S WARRANTED. THE COURT
17 IS DEPARTING CERTAINLY UPWARD FROM THE GUIDELINE RANGE IN
18 SENTENCING OUTSIDE OF THE GUIDELINE RANGE, BUT I THINK IT'S
19 APPROPRIATE FOR SOME OF THE FACTORS THAT THE COURT WILL
20 ADDRESS.

21 THE NATURE OF THE OFFENSE, CERTAINLY PROBATION HAS
22 CHARACTERIZED IT AS UNUSUALLY DEPRAVED --

23 THAT MAY BE THE BEST WAY TO DESCRIBE IT.

24 -- INVOLVING YOUNGSTERS, MINORS; THE AGES OF THESE
25 YOUNGSTERS, IN SUCH SERIOUS CONDUCT, CONDUCT THAT MAY AFFECT

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1 THEM FOR THE REST OF THEIR LIVES, CERTAINLY MAY AFFECT THEIR
2 ABILITY TO ENGAGE IN SEXUAL CONDUCT THAT MANY MAY FEEL IS A
3 MORE NORMAL TYPE OF SEXUAL CONDUCT.

4 THE AGES OF THE VICTIMS; NUMBER OF OFFENSES; THE
5 FACT THAT THIS TOOK PLACE OVER A PERIOD OF FIVE YEARS; THE
6 FACT THAT SOME VICTIMS WERE EXPOSED TO THE CONDUCT ON MORE
7 THAN ONE OCCASION; THE PICTURES THAT WERE TAKEN, THE DIARY,
8 THE HANDWRITTEN DESCRIPTION OF THE CONDUCT THAT TOOK PLACE
9 OR THAT THE DEFENDANT DESIRED TO TAKE PLACE; THE RECRUITING
10 OF SOME YOUNGSTERS TO BRING EVEN YOUNGER VICTIMS; THE IMPACT
11 STATEMENTS OF THE VICTIMS THEMSELVES; THE FACT THAT SOME
12 AREN'T EVEN AWARE, MAYBE EVEN NOW, UNLESS SOMEONE HAS TOLD
13 THEM, THAT THERE WAS ANYTHING IMPROPER IN THE CONDUCT THAT
14 TOOK PLACE -- THESE ARE ALL FACTORS THAT THE COURT HAS
15 CONSIDERED.

16 I DO CONSIDER THESE TO BE AGGRAVATING FACTORS,
17 AGGRAVATING CIRCUMSTANCES THAT WARRANT A SENTENCE MUCH
18 HIGHER THAN THE SENTENCE THAT'S DICTATED UNDER THE
19 GUIDELINES.

20 THE FACT THAT THE DEFENDANT HAS ADMITTED TO THE
21 CONDUCT, THE NUMBER OF BOYS INVOLVED, THE AGE OF THE BOYS IS
22 A FACTOR THAT THE COURT HAS CONSIDERED AS WELL.

23 IT'S EXTRAORDINARY IN TERMS OF THE NUMBER OF
24 VICTIMS INVOLVED AND THE PERIOD OVER WHICH THE CONDUCT TOOK
25 PLACE.

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1 THE FACT THAT -- AND, OF COURSE, THIS IS JUST
2 BASED ON THE STATUTE ITSELF -- THAT ONE WOULD LEAVE ONE
3 COUNTRY, GO TO OTHER COUNTRIES WITH THE INTENT OF MOLESTING
4 YOUNG CHILDREN, AND THE COUNTRY CHOSEN, THAILAND, A COUNTRY
5 WHERE THERE IS A LOT OF POVERTY AND FAMILIES SOMETIMES DON'T
6 EVEN THINK OF WHAT CONDUCT MAY TAKE PLACE WHEN THEIR
7 CHILDREN ARE EXPOSED TO THIS.

8 IN THIS CASE, OF COURSE, THESE WERE -- IT'S BEEN
9 DESCRIBED AS YOUNGSTERS WHO -- SOME OF WHOM DID NOT HAVE
10 FAMILIES, DID NOT HAVE HOMES, LIVED ON THE STREET, AND WOULD
11 ENGAGE IN CONDUCT FOR SUCH SMALL AMOUNTS OF MONEY AND SUCH
12 SMALL FAVORS AS HAVE BEEN ADDRESSED IN THIS CASE.

13 THOSE ARE ALL OF THE FACTORS THAT THE COURT HAS
14 CONSIDERED AND THE COURT BELIEVES WARRANTS A SENTENCE
15 OUTSIDE OF THE GUIDELINE RANGE IN THIS CASE.

16 ALSO, I WOULD JUST INDICATE THAT EVEN IF THE
17 GUIDELINES HAD BEEN CALCULATED DIFFERENTLY SO HAD THE COURT
18 FOUND THAT THE VULNERABLE VICTIM ADJUSTMENT APPLIED AND HAD
19 I IMPOSED THAT, I WOULD STILL FIND THE SENTENCE THAT THE
20 COURT IS IMPOSING TO BE WARRANTED AND REASONABLE IN THIS
21 CASE.

22 EVEN IF THE MULTIPLE COUNT ADJUSTMENT AND THE
23 PATTERN OF ACTIVITY RESULTS IN EITHER DOUBLE COUNTING OR
24 JUST THE FACTORS THAT HAVE BEEN CONSIDERED IN CALCULATING
25 OTHER PARTS OF THE GUIDELINE, EVEN IF THAT SHOULD BE FOUND

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1 TO BE NOT WARRANTED IN THIS CASE OR NOT APPROPRIATE IN TERMS
2 OF THE GUIDELINE CALCULATION, THE COURT WOULD STILL FIND
3 THAT THE SENTENCE THAT THE COURT WILL IMPOSE THIS AFTERNOON
4 IS THE APPROPRIATE SENTENCE.

5 SO SENTENCING OUTSIDE THE GUIDELINES, REGARDLESS
6 OF HOW I CALCULATED THEM, WHETHER PROBATION IS RIGHT OR THE
7 DEFENSE IS RIGHT OR THE GOVERNMENT IS RIGHT, THE COURT STILL
8 BELIEVES THAT THE SENTENCE THAT THE COURT WILL IMPOSE IS A
9 WARRANTED AND APPROPRIATE SENTENCE IN THIS CASE.

10 THEREFORE, THE COURT SENTENCES AS FOLLOWS:

11 THE DEFENDANT IS ORDERED TO PAY TO THE
12 UNITED STATES A SPECIAL ASSESSMENT OF \$200. IT'S DUE
13 IMMEDIATELY, BUT IT MAY BE PAID DURING THE PERIOD OF
14 SUPERVISION.

15 THE COURT WAIVES THE FINES. THE COURT FINDS THE
16 DEFENDANT DOES NOT HAVE THE ABILITY TO PAY A FINE.

17 AND EARLIER TODAY WE WERE DISCUSSING THE
18 DEFENDANT'S FINANCIAL STATUS AND WHETHER HE SHOULD PAY FOR
19 THE COST OF TREATMENT, AND THE COURT WILL ADDRESS THAT A
20 LITTLE BIT LATER.

21 PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT
22 IS THE JUDGMENT OF THE COURT THAT THIS DEFENDANT IS HEREBY
23 COMMITTED ON COUNTS 4 AND 10 OF THE FIRST SUPERSEDING
24 INDICTMENT TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE
25 IMPRISONED FOR A TERM OF 300 MONTHS; SO IT'S A 25-YEAR

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1 SENTENCE.

2 THIS TERM CONSISTS OF 300 MONTHS ON EACH OF THE
3 COUNTS 4 AND 10 TO BE SERVED CONCURRENTLY.

4 UPON RELEASE FROM IMPRISONMENT, DEFENDANT SHALL BE
5 PLACED ON SUPERVISED RELEASE FOR LIFE. THE TERM CONSISTS OF
6 LIFE ON EACH COUNTS 4 AND 10 TO RUN CONCURRENTLY UNDER THE
7 FOLLOWING TERMS AND CONDITIONS.

8 AND I'LL ATTEMPT TO MODIFY THE CONDITIONS
9 CONSISTENT WITH THE DISCUSSION THAT WE'VE HAD AND CONSISTENT
10 WITH THE ADDITIONAL INFORMATION THAT PROBATION HAS PROVIDED.

11 SO WHEN I FINISH, COUNSEL CAN CERTAINLY CORRECT
12 THE RECORD TO THE EXTENT THAT I FAIL TO MAKE MODIFICATIONS
13 CONSISTENT WITH THE DISCUSSIONS THAT HAVE ALREADY TAKEN
14 PLACE.

15 NO. 1. THE DEFENDANT SHALL COMPLY WITH THE RULES
16 AND REGULATIONS OF THE UNITED STATES PROBATION OFFICE AND
17 GENERAL ORDER 318, AS WELL AS THE GENERAL PROVISIONS UNDER
18 THE COMPUTER-MONITORING PROGRAM, RULES, AND PARTICIPATION
19 AGREEMENT.

20 AS DEFENSE COUNSEL SAID, IF ANY OF THOSE SHOULD
21 BECOME THE SUBJECT OF A VIOLATION OF SUPERVISED RELEASE,
22 THEN, OF COURSE, WE WILL HAVE FURTHER DISCUSSIONS ON WHETHER
23 THOSE SHOULD HAVE BEEN IMPOSED;

24 NO. 2. DURING THE PERIOD OF COMMUNITY
25 SUPERVISION, DEFENDANT WILL PAY THE SPECIAL ASSESSMENT IN

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1 ACCORDANCE WITH THIS JUDGMENT AND COMMITMENT ORDER;

2 NO. 3. THE DEFENDANT SHALL COOPERATE IN THE
3 COLLECTION OF A D.N.A. SAMPLE FROM THE DEFENDANT;

4 THE FOURTH CONDITION, THE DEFENDANT SHALL POSSESS
5 AND USE ONLY THOSE COMPUTERS AND COMPUTER-RELATED DEVICES,
6 SCREEN USER NAMES, PASSWORDS, E-MAIL ACCOUNTS, AND INTERNET
7 SERVICE PROVIDERS WHICH HAVE BEEN DISCLOSED TO THE PROBATION
8 OFFICER UPON THE COMMENCEMENT OF SUPERVISION.

9 ANY CHANGES OR ADDITIONS ARE TO BE DISCLOSED TO
10 PROBATION, THE PROBATION OFFICER PRIOR TO THE FIRST USE.

11 COMPUTERS AND COMPUTER-RELATED DEVICES ARE
12 PERSONAL COMPUTERS, PERSONAL DATA ASSISTANTS, (PDA'S),
13 INTERNET APPLICATIONS, ELECTRONIC GAMES, CELLULAR
14 TELEPHONES, DIGITAL STORAGE MEDIA, AS WELL AS THEIR
15 PERIPHERAL EQUIPMENT THAT CAN ACCESS OR CAN BE MODIFIED TO
16 ACCESS THE INTERNET, ELECTRONIC BULLETIN BOARDS, AND OTHER
17 COMPUTERS;

18 CONDITION NO. 5. ALL COMPUTERS, COMPUTER-RELATED
19 DEVICES, AND THEIR PERIPHERAL EQUIPMENT USED BY THE
20 DEFENDANT SHALL BE SUBJECT TO SEARCH AND SEIZURE. THIS
21 SHALL NOT APPLY TO ITEMS USED AT THE EMPLOYMENT SITES WHICH
22 ARE MAINTAINED AND MONITORED BY THE EMPLOYER.

23 NEXT CONDITION, THE DEFENDANT SHALL COMPLY WITH
24 THE RULES AND REGULATIONS OF THE COMPUTER-MONITORING
25 PROGRAM. THE COURT DOES NOT IMPOSE A COST. THE COURT DOES

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1 NOT HAVE ADEQUATE INFORMATION CONCERNING THE DEFENDANT'S
2 ABILITY TO PAY; AND CONSIDERING THE NUMBER OF YEARS THAT THE
3 COURT HAS IMPOSED IN CUSTODY, AND THE DEFENDANT'S AGE,
4 WHETHER HE WILL BE ABLE TO FIND EMPLOYMENT OR SATISFY THIS
5 OBLIGATION, IT'S UNKNOWN TO THE COURT. SO I'M NOT IMPOSING
6 IT.

7 I THINK THE TREATMENT PROGRAMS AND THE ASSISTANCE
8 THAT PROBATION WILL BE ABLE TO OFFER THE DEFENDANT ARE
9 IMPORTANT AND ANY COMMUNITY-BASED PROGRAMS THAT MAY BE
10 AVAILABLE TO HIM, THAT HE PARTICIPATE IN THOSE WITHOUT THE
11 BURDEN OF HAVING TO WORRY ABOUT HOW TO PAY FOR THEM.

12 NEXT CONDITION, THE DEFENDANT SHALL SUBMIT TO A
13 SEARCH AT ANY TIME WITH OR WITHOUT A WARRANT BY ANY LAW
14 ENFORCEMENT OR PROBATION OFFICER OF THE DEFENDANT, OF HIS
15 PERSON OR PROPERTY -- HIS HOUSE, HIS RESIDENCE, VEHICLE,
16 PAPERS, COMPUTER, OTHER ELECTRONIC COMMUNICATIONS OR DATA
17 STORAGE DEVICES OR MEDIA AND EFFECTS -- UPON REASONABLE
18 SUSPICION CONCERNING A VIOLATION OF THE CONDITIONS OF
19 SUPERVISION OR UNLAWFUL CONDUCT BY THE DEFENDANT OR BY ANY
20 PROBATION OFFICER IN THE LAWFUL DISCHARGE OF THE OFFICER'S
21 SUPERVISION FUNCTIONS.

22 THE DEFENDANT SHALL NOT POSSESS OR USE A COMPUTER
23 WITH ACCESS TO ANY ONLINE SERVICE OF ANY LOCATION WITHOUT
24 THE PRIOR APPROVAL OF PROBATION. THIS INCLUDES ACCESS
25 THROUGH ANY INTERNET SERVER, PROVIDER, OR BULLETIN BOARD

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1 SYSTEM OR ANY PUBLIC OR PRIVATE COMPUTER NETWORK SYSTEM.

2 THE DEFENDANT SHALL NOT HAVE ANOTHER INDIVIDUAL
3 ACCESS THE INTERNET ON HIS BEHALF TO OBTAIN FILES OR
4 INFORMATION WHICH HE HAS BEEN RESTRICTED FROM ACCESSING
5 HIMSELF OR TO ACCEPT RESTRICTED FILES OR INFORMATION FROM
6 OTHER PERSONS.

7 THE DEFENDANT SHALL REGISTER WITH THE STATE SEX
8 OFFENDER REGISTRATION AGENCY IN ANY STATE WHERE THE
9 DEFENDANT RESIDES, IS EMPLOYED, CARRIES ON A VOCATION, IS A
10 STUDENT, AS DIRECTED BY PROBATION.

11 THE DEFENDANT SHALL PROVIDE PROOF OF REGISTRATION
12 TO PROBATION WITHIN 30 DAYS OF RELEASE FROM IMPRISONMENT.

13 THE DEFENDANT SHALL PARTICIPATE IN A
14 PSYCHOLOGICAL/PSYCHIATRIC COUNSELING AND/OR SEX OFFENDER
15 TREATMENT PROGRAM, WHICH MAY INCLUDE INPATIENT TREATMENT, IF
16 SUCH PROGRAM IS APPROVED BY PROBATION WITH OR WITHOUT
17 CONSENT BY THE DEFENDANT AND DEFENSE COUNSEL.

18 DEFENDANT SHALL TAKE ALL PRESCRIBED MEDICATION AS
19 DIRECTED BY PROBATION.

20 SO THIS IS PRESCRIBED MEDICATION. AND THE
21 MODIFIER IS JUST PROBATION'S DIRECTION THAT THE DEFENDANT
22 SHALL TAKE ALL PRESCRIBED MEDICATION, INCLUDING MEDICATION
23 THAT MAY BE PRESCRIBED BY A PROFESSIONAL CONCERNING THE
24 VARIOUS PROGRAMS OR TESTS THAT THE DEFENDANT MAY BE
25 PARTICIPATING IN.

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1 AGAIN, THE COURT IS NOT REQUIRING THAT THE
2 DEFENDANT PAY THE COST.

3 THIS DOES NOT INCLUDE ANTI-PSYCHOTIC MEDICATION OR
4 HORMONAL DRUGS TO REDUCE ONE'S SEX DRIVE OR CAUSE IMPOTENCE.
5 SUCH COULD BE REQUIRED ONLY WITH PERMISSION OF THE COURT.

6 SO IF ANYONE RECOMMENDS -- EVEN A MEDICAL
7 DOCTOR -- THAT ANTI-PSYCHOTIC OR HORMONAL DRUGS BE USED AS A
8 PART OF TREATMENT, IT WOULD BE NECESSARY FIRST TO RETURN TO
9 COURT AND GET PERMISSION OF THE COURT.

10 DEFENDANT SHALL NOT POSSESS ANY MATERIALS
11 INCLUDING PICTURES, PHOTOGRAPHS, BOOKS, WRITINGS, DRAWINGS,
12 VIDEO, OR VIDEO GAMES DEPICTING AND/OR DESCRIBING SEXUALLY
13 EXPLICIT CONDUCT, AND IT DOES NOT INCLUDE MATERIALS THAT MAY
14 BE USED FOR TREATMENT TO THE EXTENT THAT THE DEFENDANT'S
15 INVOLVED IN THE TREATMENT PROGRAM.

16 THE DEFENDANT SHALL NOT POSSESS ANY MATERIALS,
17 INCLUDING PICTURES, PHOTOGRAPHS, BOOKS, WRITINGS, DRAWINGS,
18 VIDEO, VIDEO GAMES, DEPICTING OR DESCRIBING CHILD
19 PORNOGRAPHY, BUT IT DOES NOT INCLUDE HAVING IN HIS
20 POSSESSION HIS PRESENTENCE REPORT, INCLUDING COPIES OF
21 STATUTES IN CASES THAT HE MAY NEED IF HE WERE TO BRING A
22 COLLATERAL CHALLENGE TO THE SENTENCE.

23 THE DEFENDANT SHALL NOT OWN, USE, OR HAVE ACCESS
24 TO SERVICES OF ANY COMMERCIAL MAIL-RECEIVING AGENCY, NOR
25 SHALL HE OPEN OR MAINTAIN A POST OFFICE BOX WITHOUT PRIOR

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1 WRITTEN APPROVAL OF PROBATION.

2 THE DEFENDANT SHALL NOT FREQUENT OR LOITER WITHIN
3 A HUNDRED FEET OF SCHOOLYARDS, PARKS, PUBLIC SWIMMING POOLS,
4 PLAYGROUNDS, YOUTH CENTERS, VIDEO ARCADE FACILITIES, OR
5 OTHER PLACES PRIMARILY USED BY PERSONS UNDER THE AGE OF 18.

6 DEFENDANT SHALL NOT ASSOCIATE OR HAVE VERBAL,
7 WRITTEN, TELEPHONIC OR ELECTRONIC COMMUNICATION WITH ANY
8 PERSON UNDER THE AGE OF 18 EXCEPT IN THE PRESENCE OF THE
9 PARENT OR LEGAL GUARDIAN OF THE PERSON UNDER THE AGE OF 18
10 AND ON CONDITION THAT THE DEFENDANT NOTIFY THE PARENT OR
11 LEGAL GUARDIAN OF THIS CONVICTION OR THE CONVICTION IN THE
12 INSTANT OFFENSE.

13 THIS PROVISION DOES NOT ENCOMPASS PERSONS UNDER
14 THE AGE OF 18 SUCH AS WAITERS, CASHIERS, TICKET VENDORS WITH
15 WHOM DEFENDANT MUST INTERACT IN ORDER TO OBTAIN ORDINARY AND
16 USUAL COMMERCIAL SERVICES.

17 DEFENDANT SHALL NOT AFFILIATE WITH, OWN, CONTROL,
18 VOLUNTEER AND/OR BE EMPLOYED IN ANY CAPACITY BY A BUSINESS
19 AND/OR ORGANIZATION THAT CAUSES HIM TO REGULARLY CONTACT
20 PERSONS UNDER THE AGE OF 18.

21 DEFENDANT SHALL NOT AFFILIATE WITH, OWN, CONTROL
22 OR BE EMPLOYED IN ANY CAPACITY BY A BUSINESS WHOSE PRINCIPAL
23 PRODUCT IS THE PRODUCTION AND/OR SELLING OF MATERIALS
24 DEPICTING OR DESCRIBING, QUOTE, "SEXUALLY EXPLICIT CONDUCT,"
25 AS DEFINED IN 18 UNITED STATES CODE SECTION 22562.

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AND IN THESE CONDITIONS, WHENEVER THE COURT USES
THAT EXPRESSION "SEXUALLY EXPLICIT CONDUCT," THE COURT IS
REFERRING TO THE DEFINITION INCLUDED IN 18 UNITED STATES
CODE 22562.

THE DEFENDANT'S EMPLOYMENT SHOULD BE APPROVED BY PROBATION, AND ANY CHANGE IN EMPLOYMENT MUST BE PREAPPROVED BY PROBATION. THE DEFENDANT SHALL SUBMIT THE NAME AND ADDRESS OF THE PROPOSED EMPLOYER TO PROBATION AT LEAST TEN DAYS PRIOR TO ANY SCHEDULE CHANGE.

AND THEN, FINALLY, DEFENDANT SHALL NOT RESIDE
WITHIN DIRECT VIEW OF SCHOOLYARDS -- IN HIS DIRECT VIEW OF
SCHOOLYARDS, PARKS, PUBLIC SWIMMING POOLS, PLAYGROUNDS,
YOUTH CENTERS, VIDEO ARCADE FACILITIES, OR OTHER PLACES
PRIMARILY USED BY PERSONS UNDER THE AGE OF 18.

DEFENDANT'S RESIDENCE SHALL BE APPROVED BY THE PROBATION OFFICER. ANY CHANGE IN RESIDENCE MUST BE PREAPPROVED BY PROBATION. DEFENDANT SHALL SUBMIT THE ADDRESS OF THE PROPOSED RESIDENCE TO PROBATION AT LEAST TEN DAYS PRIOR TO ANY SCHEDULED MOVE.

(PAUSE .)

THE COURT: THOSE ARE THE CONDITIONS OF SUPERVISED
RELEASE.

THIS IS THE TIME FOR COUNSEL TO BRING TO THE
ATTENTION OF THE COURT IF ANY OF THE CONDITIONS WERE TO BE
MODIFIED, LANGUAGE CHANGE, PLEASE ADVISE THE COURT SO I

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1 COULD CORRECT THE RECORD.

2 ANYTHING FROM THE GOVERNMENT?

3 **MS. PEACE GARNETT:** NO, YOUR HONOR.

4 **THE COURT:** FROM THE DEFENSE?

5 **MR. DYBWAD:** NO, YOUR HONOR.

6 **THE COURT:** THE JUSTIFICATION FOR THE SENTENCE,
7 THE COURT HAS ALREADY INDICATED ON THE RECORD.

8 THE CONSIDERATION OF THE FACTORS, 18 UNITED STATES
9 CODE 3553(A), AND THE JUSTIFICATION FOR THE UPWARD DEPARTURE
10 FROM THE GUIDELINE RANGE. AND THOSE ARE THE SAME REASONS
11 THAT THE COURT HAS IMPOSED THE SENTENCE OF 300 MONTHS, THAT
12 THE COURT CONSIDERS TO BE A REASONABLE SENTENCE. IT'S NOT
13 EXCESSIVE. THE STATUTE DOES PROVIDE FOR A MANDATORY
14 SENTENCE THAT'S GREATER THAN THE ONE THE COURT IMPOSED, BUT
15 THE COURT FINDS THIS TO BE A REASONABLE SENTENCE CONSIDERING
16 THE CIRCUMSTANCES.

17 THE RECOMMENDATIONS, I THINK DEFENSE HAS ASKED
18 THAT THE COURT RECOMMEND THAT THE DEFENDANT BE DESIGNATED BY
19 THE BUREAU TO SERVE HIS SENTENCE AT THE FACILITY WHERE HE'S
20 BEEN FOR THE LAST THREE YEARS.

21 AND THE NAME, AGAIN?

22 **MR. DYBWAD:** F.C.I. SEAGOVILLE,
23 S-E-A-G-O-V-I-L-L-E.

24 **THE COURT:** AND THE COURT WILL SO RECOMMEND, AS
25 WELL AS RECOMMENDING THAT HE BE PERMITTED TO PARTICIPATE IN

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1 THE TREATMENT PROGRAM THAT'S DESIGNED FOR THE OFFENSE OR THE
2 OFFENSES OF CONVICTION, IF HE IS OTHERWISE QUALIFIED TO DO
3 SO.

4 **MR. DYBWAD:** AND IF YOUR HONOR WOULD ALSO MAKE A
5 TEMPORARY RECOMMENDATION.

6 I BELIEVE MR. PROWLER WAS FLOWN IN TO
7 SAN BERNARDINO LAST NIGHT. IF THE COURT WOULD CONSIDER
8 ENTERTAINING MAKING A RECOMMENDATION THAT HE BE HOUSED AT
9 M.D.C. PRIOR TO PERHAPS BEING RETURNED TO F.C.I. SEAGOVILLE.

10 **THE COURT:** PENDING DESIGNATION --

11 **MR. DYBWAD:** PENDING DESIGNATION.

12 **THE COURT:** -- THE COURT WOULD SO ORDER.

13 DEFENDANT, OF COURSE, WILL BE GIVEN CREDIT FOR HIS
14 TIME HE'S ALREADY SERVED TO BE CALCULATED BY THE BUREAU.

15 ANYTHING ELSE THAT COUNSEL WOULD LIKE TO HAVE THE
16 COURT MAKE SPECIFIC FINDINGS JUST FOR FUTURE PURPOSES?

17 **MR. DYBWAD:** YOUR HONOR, IF I MAY HAVE A MOMENT.

18 **THE COURT:** SURE.

19 (PAUSE.)

20 (COUNSEL CONFERRED OFF THE RECORD.)

21 **MR. DYBWAD:** NOTHING FROM THE DEFENSE AT THIS
22 POINT, YOUR HONOR.

23 **THE COURT:** ALL RIGHT.

24 ANYTHING FURTHER FROM THE GOVERNMENT?

25 **MS. PEACE GARNETT:** AS TO THE MULTIPLE COUNT

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1 ADJUSTMENT, YOUR HONOR.

2 THE COURT: YES.

3 MS. PEACE GARNETT: THE COURT INCREASED THE
4 DEFENDANT'S OFFENSE LEVEL BY FOUR LEVELS.

5 THE COURT: YES.

6 MS. PEACE GARNETT: PROBATION RECOMMENDED FIVE
7 LEVELS, AND I JUST WANTED TO INQUIRE OF THE COURT WHETHER
8 THERE WAS A SPECIFIC MINOR THAT THE COURT DID NOT INCLUDE.

9 THE COURT: I ACTUALLY THOUGHT IT WAS A FOUR-LEVEL
10 MULTIPLE COUNT ADJUSTMENT, AND THE PATTERN OF ACTIVITY WAS
11 THE FIVE.

12 MS. PEACE GARNETT: ALL RIGHT, YOUR HONOR.

13 THE COURT: OKAY. I'LL STAY WITH WHAT I FOUND.

14 OKAY. ANYTHING FURTHER FROM ANYONE?

15 THE COURT WILL ADVISE THE DEFENDANT OF HIS RIGHT
16 TO APPEAL, OBVIOUSLY.

17 DEFENDANT DOES HAVE A RIGHT TO APPEAL FROM THE
18 SENTENCE THAT HAS BEEN IMPOSED. I THINK HE KNOWS WHAT TO DO
19 AND HOW TO DO THAT, BUT THE COURT WOULD ADVISE OR ORDER THAT
20 COUNSEL FILE THE NOTICE FOR HIM IF HE WISHES TO APPEAL FROM
21 THE IMPOSITION OF SENTENCE.

22 IT'S HIS RESPONSIBILITY TO KEEP THE NINTH CIRCUIT
23 ADVISED AT ALL TIMES OF HIS CURRENT ADDRESS.

24 BUT COUNSEL WILL FILE THE NOTICE FOR HIM IF HE
25 WISHES TO APPEAL JUST TO PROTECT HIS APPEAL RIGHTS.

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1 AND I'M SURE COUNSEL WILL EXPLAIN, BUT THERE ARE
2 ISSUES THAT THE DEFENDANT MAY BE INTERESTED IN HAVING THE
3 APPELLATE COURT REVIEW SUCH AS THE CALCULATIONS OF THE
4 GUIDELINES, WHETHER SOME OF THESE THINGS WERE APPROPRIATE TO
5 ENHANCE UNDER THE GUIDELINE CALCULATION, THE UPWARD
6 DEPARTURE FROM THE GUIDELINES, AND THEN OBVIOUSLY THE
7 ULTIMATE SENTENCE THAT THE COURT HAS IMPOSED.

8 I ENCOURAGE THE DEFENDANT TO CONTINUE TO BE
9 INVOLVED IN THE PROGRAMS THAT ARE AVAILABLE THROUGH THE
10 BUREAU OF PRISONS.

11 YOU'VE ALREADY BEEN IN SOME PROGRAMS THAT I THINK
12 YOU HAVE FOUND TO BE BENEFICIAL. I ENCOURAGE YOU TO
13 CONTINUE TO DO SO AND TAKE ADVANTAGE OF THE OPPORTUNITY TO
14 BETTER UNDERSTAND THE CASE, YOUR INVOLVEMENT IN IT, THE
15 EFFECT THAT ALL OF THIS HAS HAD ON YOUR LIFE, THE LIFE OF
16 THE YOUNGSTERS INVOLVED.

17 UNLESS THERE'S SOMETHING FURTHER, THIS DOES
18 COMPLETE THE SENTENCING HEARING.

19 **MR. DYBWAD:** NOTHING FROM THE DEFENSE, YOUR HONOR.

20 **MS. PEACE GARNETT:** THANK YOU, YOUR HONOR.

21 **THE CLERK:** PLEASE RISE.

22 (PROCEEDINGS CONCLUDED.)

23 --OOO--

24

25

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CERTIFICATE

I HEREBY CERTIFY THAT PURSUANT TO SECTION 753,
TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND
CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED
PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE
TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE
REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 12TH DAY OF OCTOBER, 2010.

MARY RIORDAN RICKEY
OFFICIAL COURT REPORTER

JULY 30, 2010